Office-Supreme Court, U.S.
FILED
JUL 21 1981
ALEXANDER L. STEVAS,
CLERK

81-128

No.

In the

Supreme Court of the United States

OCTOBER TERM, 1981

LYON & RYAN FORD, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

HENDRICKS AND ASSOCIATES, LTD.
JAMES F. HENDRICKS, JR.
NANCY JO ARNOLD
Attorneys for Petitioner

HENDRICKS AND ASSOCIATES, LTD.
2015 Spring Road, Suite 250
Oak Brook, Illinois 60521
(312) 655-1999

The Scheffer Press, Inc.—(312) 263-6850

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

LYON & RYAN FORD, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Lyon & Ryan Ford, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on April 24, 1981.

QUESTIONS PRESENTED

I. Can an employer be held to have recognized a union as the bargaining

representative of its employees without clear and unequivocal evidence of its having made a voluntary commitment to do so?

II. Can the National Labor Relations Board reverse its prior policy of over thirty years' standing and apply an opposite policy retroactively to order an employer to pay back pay to strikers who never sought to return to work from a strike which the employer believed from the facts as he knew them to be an economic strike?

PARTIES

The Respondent, the National Labor Relations Board, was the Petitioner in the Court of Appeals and Petitioner, Lyon & Ryan Ford, Inc., was the Respondent. A motion to intervene by Automobile Mechanics Local No. 701 was denied by the Court of Appeals as untimely.

Petitioner corporation has no parent company, subsidiary, or affiliate.

TABLE OF CONTENTS

PAGE

Questions Presented 1

Parties 2

Table of Authorities. 8

Opinions Below. 10

Jurisdiction. 10

Statute Involved. 10

Statement of the Case 11

Reasons For Granting the Writ 20

I. The Question of Whether an Employer's Mere Examination of Authorization Cards Pressed upon Him by a Union Can Be Held to Constitute Recognition of the Union Without Clear and Unequivocal Evidence That by This Action the Employer Intended Voluntarily to Commit Himself to Recognizing the Union as the Representative of His Employees Without Benefit of an Election is an Important and Reoccurring Question of Federal Law Which has Not Been, But Should Be, settled by This Court. . .

A. This Case Presents A Question That is a Natural Outgrowth of This Court's Decisions in NLRB v. Gissel Packing Co. and Linden Lumber Division v. NLRB and the Board's Practice Since Those Decisions 20

Con't

PAGE

B. The Board in Jerr-Dan Corp., Supra, Decided the Question in a Manner That Is in Conflict With the Purposes and Intent of the Act. . . . 24

C. The Court of Appeals for the First Circuit Perceived the Inadequacies of the Board's Policy But Declined to Instruct the Board on Its Method of Fact-Finding 26

D. The Court of Appeals for the Ninth Circuit and the Court of Appeals for the Seventh Circuit in this Case Failed to Scrutinize the Board's Method of Fact-Finding. . . . 28

E. Since the Board's Decision in Jerr-Dan, a Pattern Has Emerged by Which the Board Has Effectively Emasculated Its Own Policy So Recently Approved by This Court in Linden Lumber. 29

F. If Left Undisturbed, the Board's Policy Will Potentially Affect the Employees, the Employer, and the Union Involved in Every New Organization Drive Commenced Upon An Unsuspecting Employer. 30

II. The Question Whether the Board Can Order an Employer to Pay Back Pay to Strikers Who Never Sought to Return to Work From a Strike Which the Employer Believed From the Facts as He Knew Them to be an Economic Strike is an Important Question of Federal Law Which Has Not Been, But

Con't

PAGE

Should Be, Settled by This Court. . . 31

A. The Court of Appeals for the Seventh Circuit is the Only Court to Have Examined the Board's New Remedial Policy Announced in Abilities and Goodwill. 31

B. The Board's New Remedial Policy Should Be Reviewed by This Court Because the Question is Likely to Reoccur Any Time a Strike Follows a Union Attempt to Obtain Recognition on a Card Majority, As Well As in a Multitude of Other Strike Situations. 33

C. The Board's New Remedial Policy Announced in Abilities and Goodwill is Contrary to the Purposes of the Act. 34

III. The Court of Appeals' Decision That the Board's New Policy Could Be Applied Retroactively Against an Employer is in Conflict With Applicable Decisions of this Court 37

Conclusion. 40

APPENDIX

PAGE

APPENDIX A - Opinion and Judgment of the United States Court of Appeals for the Seventh Circuit . .

APPENDIX B - Decision and Order of National Labor Relations Board. . . B-1

APPENDIX C - Decision of the Administrative Law Judge C-1

APPENDIX D - Portions of National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. Section 151 et seq. D-1

29 U.S.C. Sec. 158 (a), (c) and (d) D-1
29 U.S.C. Sec. 159. . . . . D-7
29 U.S.C. Sec. 160. . . . . D-16

TABLE OF AUTHORITIES

PAGE

Abilities and Goodwill, Inc., 241 NLRB No. 5, (March 15, 1979), enf. denied, 612 F.2d 6 (1st Cir. 1979) 18,31-39

Chevron Oil Co. v. Hudson 404 U.S. 97 (1971) 37-39

Jerr-Dan Corp., 237 NLRB 302 (1978), enf'd. 601 F.2d 575 (3rd Cir. 1979) 23-25,29-30

Joy Silk Mills, Inc., 85 NLRB 1263 (1949) enf'd. 185 F.2d 732 (D.C. 1950) 30

Linden Lumber Division v. NLRB, 419 U.S. 301 (1974) 22-26,29-30

Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956) 36

NLRB v. Broadmoor Lumber Co., 578 F.2d 238 (9th Cir. 1978) . . 23,28-30

NLRB v. Brown & Connolly, 593 F.2d 1373 (1st Cir. 1979) 26-30

NLRB v. Gissel Packing Co., 395 U.S. 575 (1969) 20,22,30

NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967). 36

NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938) 36

Con't

PAGE

NLRB v. Mars Sales & Equipment Co.,
626 F.2d 567 (7th Cir. 1980) . . . 33

Toltec Metals, Inc. v. NLRB,
490 F.2d 1122 (3rd Cir. 1974). . . 23

Universal Camera Corp. v. NLRB,
340 U.S. 474 (1951) 28

OPINIONS BELOW

The Opinion of the Court of Appeals is not yet officially reported. It was issued on April 24, 1981 in Case No. 80-1312.

The Decision and Order of the National Labor Relations Board is reported officially as Lyon & Ryan Ford, Inc., 246 NLRB No. 2 (1979).

JURISDICTION

The decree of the Court of Appeals for the Seventh Circuit was decided and entered on April 24, 1981. This petition for certiorari is timely filed within 90 days of that date. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTE INVOLVED

This case involves the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C.

Section 151 et. seq., particularly 29 U.S. C. Section 158(a), (c) and (d), Section 159, and Section 160, set out in the Appendix at Appendix D.

STATEMENT OF THE CASE

Jurisdiction in the Federal Court of First Instance

This case came before the United States Court of Appeals for the Seventh Circuit upon petition of the National Labor Relations Board (hereinafter "the Board") pursuant to 29 U.S.C. Section 160(e) for enforcement of its order of October 5, 1979 against Lyon & Ryan Ford, Inc. (hereinafter "the employer"). By this order the Board found the employer guilty of certain unfair labor practices, and imposed certain remedies. 1/

1/ A complaint of unfair labor practices had been issued by the General Counsel

(Footnote continued on following page)

STATEMENT OF FACTS

This case concerns a union's demands for recognition on the basis of authorization cards and for a contract. These demands were made to the employer's president, Mr. Ryan, during an unannounced and unforewarned visit to his offices by two union business representatives one day in August, 1978. The substance of Mr. Ryan's reaction to these demands that day was the crucial fact in this case, and contrary versions were presented to the Administrative Law Judge by the employer

---

1/ continued

upon charges filed by the union involved (Automobile Mechanics Local 701, International Association of Machinists and Aerospace Workers, AFL-CIO), and a hearing thereon was held by an Administrative Law Judge, who issued a Decision and Recommended Order on July 17, 1979. The Board's Order of October 5, 1979 adopted that Decision of the Administrative Law Judge.

and the union. Ultimately, because the Board accepted the union's version and drew the conclusions therefrom urged by the union, certain actions taken by the employer in reaction to subsequent events were determined to have been unfair labor practices and serious penalties were prescribed. All controverted facts will be indicated as such in this statement of facts.

The employer operates a new and used car dealership. When the two business representatives called on Mr. Ryan unannounced on August 24, 1978, this was the first awareness he had had of union organizational activity among his employees. Mr. Ryan had had no prior experiences with union matters and had not been prepared for this visit. When the two union men came in, they handed Mr. Ryan a copy of a letter addressed to him, signed

by the President of the union and requesting recognition and bargaining; they told Mr. Ryan that the original letter would be in the mail to him and that they had come to see him in order to negotiate a contract. No explanation as to why their visit must precede Mr. Ryan's receipt of the letter in the ordinary course of the mail was offered.

Mr. Ryan testified that in reaction to all of this, he told the union representatives that he would have to consult with an attorney, but the two union men testified that they proceeded to show Mr. Ryan union authorization cards signed by eleven of his employees. The union men further testified that Mr. Ryan looked at the cards handed to him and also at a copy of a master contract they handed him.

The Administrative Law Judge ultimately accepted the union's version, concluding

that Mr. Ryan had in fact looked at the authorization cards, and also accepted the union's version of the legal significance of that act, concluding that upon Mr. Ryan's looking at the authorization cards he recognized the union as the representative of a majority of employees in the unit of employees the union sought to represent.

The events subsequent to this initial union-employer contact were as follows: Mr. Ryan met with the two union men at his offices a second time four days later, and a third time four days after that. The substance of the conversation at the second meeting was controverted in almost all respects, but all agree that at the third meeting, on September 1st, Mr. Ryan stated that he wished a federal election to determine whether the union would be the representative of the employees it

sought, and the union men responded that if they did not have a signed contract by September 12th, there would be a strike on that day.

There was no further contact between the employer and the union until September 12, when several of the employer's employees went on strike and set up a picket line in front of the employer's premises with signs that said "On Strike For Recognition". About three weeks later, the employer began hiring permanent replacements for the strikers, sending notice of such replacement to each striker as his replacement was hired. The strike continued and was still in effect as of the date of the hearing before the Administrative Law Judge on April 11th of the following year (1979). Indeed, daily picketing has continued past that time, was still occurring at the time of oral argument to the Court

of Appeals in February, 1981 and continues today.

THE PROCEEDINGS BELOW

1. The National Labor Relations Board

By its order of October 5, 1979, the Board approved the findings of the Administrative Law Judge that the employer had recognized the union as the representative of its employees in an appropriate unit upon Mr. Ryan's examination on August 24, 1978 of authorization cards; that Mr. Ryan's demand on September 1, 1978 for a Board election constituted withdrawal of recognition and was an unfair labor practice under 29 U.S.C. Section 158(a)(5); that the strike which followed was therefore an unfair labor practice strike brought on by the employer's withdrawal of recognition, and not an economic strike for recognition; and that by its letters

to the striking employees informing them individually that permanent replacements had been hired to fill their respective positions, the employer had unlawfully discharged unfair labor practice strikers, not replaced economic strikers, committing an unfair labor practice under 29 U.S.C. Section 158(a)(1) and (3). The Board also adopted the recommended order that the employer cease and desist from further violations of the Act; that it bargain with the union; that it reinstate the striking employees to whom notice of permanent replacement had been sent; that it pay back pay to each of them, beginning with the respective dates of its letters; and that it post notices. The back pay award was expressly based on its new policy, announced in Abilities and Goodwill, Inc., 241 NLRB No. 5, enf. denied, 612 F.2d 6, (1st Cir., 1979), decided after the

employer in this case had sent notice of replacement to its striking employees, and reversing a Board policy of 30 years' duration.

2. The Court of Appeals

The Court of Appeals granted enforcement of the Board's order, holding that the findings and conclusions of the Board on all points had substantial support in the record. The Court expressly affirmed the Board's conclusion that the employer recognized the union when Mr. Ryan checked the authorization cards on August 24, 1978. The Court also approved the back pay award ordered by the Board, notwithstanding the fact that that award was based on a new policy announced in Abilities and applied retroactively against the employer.

REASONS FOR GRANTING THE WRIT

I. THE QUESTION OF WHETHER AN EMPLOYER'S MERE EXAMINATION OF AUTHORIZATION CARDS PRESSED UPON HIM BY A UNION CAN BE HELD TO CONSTITUTE RECOGNITION OF THE UNION WITHOUT CLEAR AND UNEQUIVOCAL EVIDENCE THAT BY THIS ACTION THE EMPLOYER INTENDED VOLUNTARILY TO COMMIT HIMSELF TO RECOGNIZING THE UNION AS THE REPRESENTATIVE OF HIS EMPLOYEES WITHOUT BENEFIT OF AN ELECTION IS AN IMPORTANT AND REOCCURRING QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A. This Case Presents A Question That is a Natural Outgrowth of This Court's Decisions in NLRB v. Gissel Packing Co. and Linden Lumber Division v. NLRB and the Board's Practice Since Those Decisions.

In NLRB v. Gissel Packing Co., 395 U.S. 575 (1969), this Court undertook an intensive examination of Board practice and policy in unfair labor practice cases involving questions of representation. In that case, the Court held that the Board could order an employer to bargain with a union which had demonstrated majority support only by authorization cards when

unfair labor practices by the employer were serious enough to render a fair election unlikely. In so doing, this Court affirmed an interpretation of 29 U.S.C. Section 158(a)(5) and Section 159(a) that a Board election is not the only way for a union to obtain recognition as the exclusive bargaining representative of a unit of employees, acknowledged the superiority of the election process over authorization cards for determining questions of representation, but held that authorization cards could be reliable enough to support a bargaining order when a fair election probably could not have been held or where an election that was held was in fact set aside because of serious employer interference. Expressly reserved was the following question: whether, when an employer refrains from serious unfair labor practices which might interfere with a

fair election, he can reject a card-based majority without good reason and insist that the union go to an election. (395 U.S. at 601, ft. 18). Otherwise stated, the question was: whether, when there have been no serious unfair labor practices by the employer likely to interfere with a fair election, as there had been in Gissel, the Board was correct in its practice that a card majority was NOT enough to support a bargaining order, even if the employer simply failed without good reason to accept the cards as proof of majority status.

In Linden Lumber Division v. NLRB, 419 U.S. 301 (1974), the Court took up the question reserved in Gissel, and answered it in the affirmative. Now it was clear that an employer need not recognize a union upon presentation of authorization cards from a majority of the unit

employees. In the Linden case, however, another question was expressly reserved: whether once he has agreed to recognize a union on the basis of a card majority, a subsequent failure to bargain could be an unfair labor practice under 29 U.S.C. Section 158(a)(5). Although this question has not been answered by this Court, the Board and some of the courts of appeals have held that once an employer recognizes a union, no matter how informally, he loses his right to wait for an election to determine the representation question. Cf. NLRB v. Broadmoor Lumber Co., 578 F.2d 238 (9th Cir. 1978); Toltec Metals, Inc. v. NLRB, 490 F.2d 1122 (3rd Cir. 1974); Jerr-Dan Corp., 237 NLRB 302 (1978), enforced 601 F.2d 575 (3rd Cir. 1979).

The question presented in this case is a natural outgrowth of these cases, especially in view of the Board's practice

in a series of cases since the Court's decision in Linden. The question asked in the present case is: if it is true that when an employer is presented with union authorization cards from his employees he need not recognize and bargain with the union, isn't it also true that when these cards are pressed upon an employer, his mere looking at them should not mean that he has thereby agreed to recognize the union?

B. The Board in Jerr-Dan Corp., Supra, Decided the Question in a Manner That Is in Conflict With the Purposes and Intent of the Act.

In Jerr-Dan, supra, the Board refused to accept the recommended order of the Administrative Law Judge, who heard the case, that the employer should not be bound to have recognized the union simply on the basis of union testimony, controverted by the employer, that its president looked at

authorization cards, said "you got them all," and agreed to schedule another meeting. The Administrative Law Judge saw in the case a demonstration that:

> oral recognition creates problems of proof and credibility and may produce work stoppages and litigation, situations which have faced the Board in related contexts (referring to Linden Lumber, supra). 237 NLRB 302,310.

The Board overruled the Administrative Law Judge and held that the testimony of the union officials was enough to establish that the employer had recognized the union. The Board policy as thereby defined in Jerr-Dan allows disposition of the very important question of whether an employer voluntarily committed himself to treat a union as the designated bargaining representative of his employees without benefit of a Board election to be left to the "frailties of oral testimony, susceptible as it is to influence tending to

mold recollection into more pleasing form." 237 NLRB at 310. This policy is bound to lead, as it has in the present case, to uncertainty on the part of employees, union, and employer alike as to the union's status, to strikes and industrial strife -- in contravention of the purposes of the Act -- to uncertainty as to the nature of such strikes and as to the parties' lawful means of recourse, and to prolonged unfair labor practice litigation and appeals in lieu of prompt resolution of representation cases by the preferred method of Board elections. See Linden Lumber, 419 U.S. at 306-307.

C. The Court of Appeals for the First Circuit Perceived the Inadequacies of the Board's Policy But Declined to Instruct the Board on Its Method of Fact-Finding.

In NLRB v. Brown and Connolly, Inc., 593 F.2d 1373 (1st Cir. 1979), decided after the Board's ruling in Jerr-Dan, the

court described the facts before it as follows:

> /On a certain date, a group of employees and/ two union organizers called on respondent's president, Brown, at his office, unannounced, and followed what would appear to be a predetermined script to obtain an admission from Brown that he 'recognized' the union . . . Caught unprepared, with no prior knowledge of organizational activity, and quite possibly unaware of an employer's right to require an election, Brown ultimately, according to the credited testimony of the employees, said the magic word. Although it took a little longer, even on General Counsel's case the whole meeting might remind chess players of the fool's mate.

The court then stated that:

> The facts in this case might suggest the desirability of a rule that recognition must be clearly and convincingly evidenced, and not dependant upon a staged performance and resolution of disputed, possibly perjured, testimony; which may have fostered here, at least in part, the very strife the Act is intended to prevent.
> 593 F.2d at 1374.

Even though it apparently disapproved of

the results, the Court declined to instruct the Board, despite this Court's admonitions in Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

D. The Court of Appeals for the Ninth Circuit and the Court of Appeals for the Seventh Circuit in this Case Failed to Scrutinize the Board's Method of Fact-Finding.

The Ninth Circuit, in NLRB v. Broadmoor Lumber Co., supra, and the Seventh Circuit in the present case each echoed the Board's findings below that the employer had already recognized the union by the time it asked for a Board election. In the present case particularly, there is no evidence that the court of appeals was able to perceive the incongruity of the Board's having found the employer to have "voluntarily committed" itself to bargain with the union on the basis only of the employer's equivocal reactions to studied ovations by union representatives.

E. Since the Board's Decision in Jerr-Dan, A Pattern Has Emerged by Which the Board Has Effectively Emasculated Its Own Policy So Recently Approved by This Court in Linden Lumber.

An examination of the fact situations in Brown & Connolly, supra, Broadmoor Lumber, supra, and the present case reveals how closely the respective union representatives appear to have followed the sequence of events that had met with union success in Jerr-Dan. In Linden Lumber it was established that an employer faced with presentation of a card majority has the right to insist upon a Board election to determine the representation question. To allow a Union to render this right a nullity by the mere expedient of an orchestrated performance calculated to take the employer by surprise, lead him through certain motions, and have two Union witnesses available to swear to what occurred,

is nothing more than a thinly-disguised return to the pre-Gissel and Linden rule that, absent a good faith doubt of the Union's majority, an employer must bargain upon being confronted with a demand therefor by a union that has a majority. See Joy Silk Mills, Inc., 85 NLRB 1263 (1949), enf'd. 185 F.2d 732 (D.C. 1950).

F. If Left Undisturbed, the Board's Policy Will Potentially Affect the Employees, the Employer, and the Union Involved in Every New Organization Drive Commenced Upon An Unsuspecting Employer.

In neither Jerr-Dan, Brown & Connolly, nor Broadmoor Lumber, supra, was certiorari sought of this court. Petitioner believes that the Board has embarked on an erractic course which, unless intercepted by this Court, will engender industrial strife and undesirable uncertainty in union organizational matters.

II. THE QUESTION WHETHER THE BOARD CAN ORDER AN EMPLOYER TO PAY BACK PAY TO STRIKERS WHO NEVER SOUGHT TO RETURN TO WORK FROM A STRIKE WHICH THE EMPLOYER BELIEVED FROM THE FACTS AS HE KNEW THEM TO BE AN ECONOMIC STRIKE IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A. The Court of Appeals for the Seventh Circuit is the Only Court to Have Examined The Board's New Remedial Policy Announced in Abilities and Goodwill.

In Abilities and Goodwill, supra, (March 15, 1979), the Board deliberately overruled prior Board precedent of over 30 years' standing and held that, if an employer is found to have unlawfully discharged his striking employees while they were on strike, the employer is liable for the payment of back pay to the strikers commencing with the date of their discharges, whether or not they had ever requested permission to return to work or given any indication of their inclination

to do so. The clear import of this rule, of course, is that the employer will be forced to pay the employees for all the time that they are on strike whenever it is found that he had discharged them unlawfully, even if they would have continued to refuse to work if they had not been discharged. Prior to the Abilities decision, the Board had not assessed back pay until the striking employees offered to give up their strike and return to work. This was the rule in order that the back pay award would serve only the purpose of making the employees whole for money they would have earned had the employer not kept them from returning to work, and in order that the strikers not be ordered compensated for voluntarily withholding their services.

The Abilities decision itself was denied enforcement on grounds that did not

require decision as to the back pay issue. Abilities and Goodwill, Inc. v. NLRB, 612 F.2d 6, (1st Cir. 1979). The Court of Appeals for the Seventh Circuit is the only court to have examined the new policy announced by the Board in Abilities, which it did in the present case and in a prior decision, NLRB v. Mars Sales & Equipment Co., 626 F.2d 567 (7th Cir., 1980).

B. The Board's New Remedial Policy Should Be Reviewed by This Court Because the Question is Likely to Reoccur Any Time A Strike Follows A Union Attempt to Obtain Recognition on a Card Majority, As Well As in a Multitude of Other Strike Situations.

The Board's new rule has its greatest impact in situations in which the right to discharge or replace is uncertain because of uncertainty over the nature of the strike, which was the case in both Abilities and in the present case. In both cases the employers took steps to replace

strikers which would have been lawful and necessary had the strike later been declared to be the kind of strike they and their counsel believed them to be. The length of time elapsing between the presentation of the ambiguous situation and its ultimate resolution through unfair labor practice proceedings makes for a potentially great back pay liability exposure in these ambiguous situations and underscores the importance of this question and the urgency of the need for its examination by this Court.

C. The Board's New Remedial Policy Announced in Abilities and Goodwill is Contrary to the Purposes of the Act.

The rationale of the Board in Abilities was to bring its policy on backpay awards to discharged strikers in structural uniformity with its policy on backpay awards to discharged working employees; under the

new policy the back pay liability accrues from the date of discharge in both situations. But of course there is a real difference between a striker, who voluntarily refuses to work, and a working employee, and that the Board should order an employer to pay them both for the time they were not working is arbitrary and an abuse of the Board's discretion under the Act.

In the present case, and in a multitude of other strike situations, from the moment the employees went on strike there was no real way to be certain whether that strike would later be characterized as an economic strike, for recognition and a contract, or as an unfair labor practice strike, over the employer's withdrawal of recognition and refusal to bargain. Until ultimate resolution of the recognition issue in unfair labor practice

proceedings, if the employer sought to continue the operation of his business he was faced with the following dilemma: If these strikers were unfair labor practice strikers, he could replace them, but only temporarily. See Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956). But if they were economic strikers and he replaced them, he could replace them only permanently and he must be careful to document by objective evidence that such replacement was NOT merely temporary. See NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938); NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967). Upon operation of the Board's new rule announced in Abilities, the employer was ordered to pay back pay to all the strikers from the dates that he sent them objective notice of their permanent replacement to the present, even though none

of the strikers had ever offered to return to work. The operation of this policy goes beyond a make-whole remedy. It operates as a punishment for the employer for having judged the situation incorrectly, forces him to support the strike that was waged against him, and interferes with the free play of economic forces in industrial disagreement, in contravention of the purposes of the Act.

III. THE COURT OF APPEALS' DECISION THAT THE BOARD'S NEW POLICY COULD BE APPLIED RETROACTIVELY AGAINST AN EMPLOYER IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The leading case concerning retroactive application of new decisional law is Chevron Oil Co. v. Hudson, 404 U.S. 97 (1971). In that case, this Court defined three factors which it had considered in its prior cases dealing with the question whether a new decision should be applied

retroactively in a given case.

One of these factors outlined in Chevron is that, in order to be a "new" decision, the decision in question must "establish a new principle of law, either by overruling clear past precedent . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed". 404 U.S. at 106. The Seventh Circuit has misstated this aspect of the Chevron ruling when it decided in the present case that, in order to constitute a new decision, the Board's decision in Abilities and Goodwill must not only have overruled past precedent, but must also not have been foreshadowed by earlier decisions. But the language in Chevron, quoted above, seems clear: the decision must either overrule clear past precedent or must be a case of first impression whose resolution was not clearly

foreshadowed. The Board's abrupt change of policy in Abilities was the result of a change of membership on the Board. The members who became the new majority had been urging this change of policy unsuccessfully in dissenting opinions in prior Board cases. These dissents and an expectation of a change in Board membership cannot be considered "foreshadowing" of a rule in a case of first impression within the meaning of Chevron, and it cannot seriously be disputed that this decision clearly overruled established past precedent. The guidance of this Court is necessary to explicate the implications of its opinion in Chevron on this question.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that a Writ of Certiorari should issue.

Respectfully submitted,

HENDRICKS AND ASSOCIATES, LTD.

Attorneys for Petitioner

By: _____
James F. Hendricks, Jr.

_____
Nancy Jo Arnold

HENDRICKS AND ASSOCIATES, LTD.
2015 Spring Road, Suite 250
Oak Brook, Illinois 60521
(312) 655-1999

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 80-1312

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

LYON & RYAN FORD, INC.,

Respondent.

Petition for Enforcement of an Order of the National Labor Relations Board.

ARGUED FEBRUARY 26, 1981—DECIDED APRIL 24, 1981

Before WOOD and CUDAHY, *Circuit Judges*, and MAROVITZ, *Senior District Judge.**

CUDAHY, *Circuit Judge*. The National Labor Relations Board has petitioned this court pursuant to Section 10(e) of the National Labor Relations Act for enforcement of an order issued against respondent, Lyon & Ryan Ford, Inc., (the "Company") for violations of Sections 8(a)(5), 8(a)(3) and 8(a)(1) of the Act. *See* 29 U.S.C. § 160(e), § 158(a) (1979). In its order, the Board adopted the findings and recommendations of an Administrative Law

---

* The Honorable Abraham L. Marovitz, Senior District Judge for the Northern District of Illinois, is sitting by designation.

Judge[1] and concluded that respondent had recognized Automobile Mechanics Local 701, International Association of Machinists and Aerospace Workers, AFL-CIO (the "Union") as the employees' bargaining representative. According to the Board, the Company later withdrew this recognition by demanding a "federal election" and refused to bargain with the Union in violation of Section 8(a)(5) of the Act. The Board further found that the employees' strike in response to the Company's withdrawal of recognition was an unfair labor practice strike, and that the Company's action in discharging six employees because of their involvement in that strike violated Sections 8(a)(3) and 8(a)(1). Finally, the Board determined that a Company executive's conversations with two employees concerning their feelings about the Union constituted impermissible interrogation and also violated the provisions of Section 8(a)(1). The order which the Board seeks to enforce requires the Company to bargain with the Union on request, to reinstate the six discharged employees with backpay and to cease and desist from engaging in further violations of the National Labor Relations Act. For the reasons set forth below, we conclude that the Board's findings are supported by substantial evidence on the record as a whole, and therefore, we grant enforcement of the Board's order.

I.

THE FACTS

Lyon & Ryan Ford, Inc. is a new and used car dealership located in Antioch, Illinois, which employs workers in various capacities to prepare and service the cars it sells. On August 17, 1978, a representative of the Union met with certain Company employees to discuss the benefits of unionization. Several days later at a second meet-

[1] The Board's order is reported as *Lyon & Ryan Ford, Inc.*, 246 NLRB No. 2 (1979).

ing ten Company employees signed union authorization cards and applications for union membership.[2]

These cards were presented to Company President Larry Ryan by Union business representatives Donald Carlson and Ed Vaughn at an impromptu meeting on August 24, 1979. Carlson and Vaughn went to Ryan's office with a copy of a letter, allegedly in the mail, which advised the Company that a majority of its "mechanics, bodymen, painters, semi-skilled and apprentices" had designated the Union as their collective bargaining agent. The letter demanded formal recognition of the Union and commencement of negotiations for a collective bargaining agreement.

During the ensuing discussion with Ryan, Carlson clarified the composition of the proposed bargaining unit. Carlson stated that the Union traditionally represented only those employees "who turn wrenches, not anybody else." In the Ryan dealership, "the parts men, the chasers, the parts chasers, the car washers and the hikers" would be excluded, leaving approximately twelve to fourteen employees in the unit represented by the Union. Ryan personally examined each of the eleven signed union authorization cards and membership applications. He also inspected a copy of the recently expired master contract for the Chicago area and a voting information sheet which contained the changes to be included in the new, but then unpublished, master contract. Carlson briefly explained the general terms of the contract and answered Ryan's specific questions on the cost of welfare and pension provisions and the Union's insurance coverage. Before concluding the meeting, Carlson reviewed the proposed wage scale with Ryan and pointed out that the Union and the Company were not far apart

[2] A total of eleven authorization cards were signed by Company employees. There was evidence presented, however, that employee Mark Mantsch, whose signed card was dated August 22, 1978, did not attend the Union meeting. As a result, the Administrative Law Judge decided not to count his card for the purpose of determining the Union's majority status.

on this issue. Carlson asked for another meeting and Ryan agreed.

The second meeting between representatives of the Union and the Company occurred four days later on August 28, 1978. Carlson, Vaughn, Larry Ryan and his son, Patrick, who served as general manager for the dealership, were in attendance. The discussion, once again, centered on the terms of the master contract. Larry Ryan stated that the Company's present vacation policy was better than the Union's contractual provision on the subject, but Carlson replied that he would take the good with the bad and go with a straight "701 Contract."

The focus of the meeting then shifted to the job classification of specific employees. All but two of the employees were classified as mechanics, semi-skilled or apprentices. The two exceptions were Gary Wilke, whom Larry Ryan categorized as a detailer, and Mark Mantsch, a wash boy, who had been doing mechanical work under the supervision of another employee. Carlson subsequently sorted through the authorization cards and placed the cards of five employees in a pile identified as journeymen. The cards of four other employees were placed in a separate pile labeled semi-skilled and apprentices. A third pile was created for the cards of Wilke and Mantsch. Carlson commented that there was a "problem" with respect to the manner in which these individuals would be classified within the unit or whether they would be included in the unit at all. The parties then discussed the balance required between mechanics, semi-skilled and apprentices, and Carlson gave examples of the situation at other dealers. Carlson requested a third meeting to resolve the Wilke-Mantsch classification question and was then given permission to go into the shop and talk to some of the employees.[3]

[3] At the administrative hearing, Larry Ryan denied that he ever gave Carlson and Vaughn permission to talk to the employees on work time. But the ALJ credited the Union representatives' testimony over that of Ryan and explained:

(Footnote continued on following page)

Later that day, Patrick Ryan approached employee Anthony Hynous at his work station and asked about the "circumstances with the Union." Hynous replied that the employees felt the Union could obtain better benefits for them. Ryan asked if more money would do, and Hynous indicated that the employees would have to evaluate that. Ryan left with the comment that "he guessed he had some talking to do."

Similarly, on August 29th, the younger Ryan called employee Michael Stern into his office and asked him what he thought about the Union. Stern answered that it sounded good, and that the Union was something the employees really wanted. Ryan then asked if money would make a difference, and Stern responded that he really didn't know.

When Carlson and Vaughn arrived for the third scheduled meeting with the Company on September 1, 1978, Larry Ryan called for a "federal election." Carlson responded that he was very disappointed with the decision since everything had been going along fine with the exception of two employees. He announced that the Union didn't have the time or the need for an election and if a contract was not signed by September 12th, "there would be a work stoppage." Carlson and Vaughn then informed two unit employees that the Company wanted an election and that the employees should be prepared to strike if a contract had not been signed by September 12th.

---

[3] *continued*

I was not impressed with the demeanor of Mr. Ryan or of his son Patrick Ryan who testified regarding the second and third visits Carlson and Vaughn made to Ryan's office. I found Carlson and Vaughn to be more open and cooperative on cross and their testimony appeared more logical under the circumstances. Also there were noticable conflicts between Larry and Patrick Ryan, the most notable involving the authorization and application cards. . . . Therefore, I have discredited the testimony of Larry and Patrick Ryan to the extent it conflicts with the testimony of Carlson and Vaughn.

246 NLRB at 34.

Eleven Company employees walked off the job on September 12, 1978, and began picketing the dealership. Six of those employees received a copy of the following form letter from the Company at various time during the month of October.

> This letter is to inform you that effective _____, we have hired an individual who will replace you on our work force. Accordingly, it will not be our intention to recall you to work at the conclusion of our labor dispute inasmuch as the new employee will be taking your place.

246 NLRB at 4.[4] The strike was still in effect on April 11, 1979, when an Administrative Law Judge conducted a hearing in this case.

From these facts, the ALJ concluded that the Union represented a majority of the employees in an appropriate unit and had satisfactorily demonstrated that status to Company President Larry Ryan, who recognized the Union as bargaining representative for unit employees on August 24, 1978. The ALJ further found that the Company had engaged in discussions and negotiations with the Union over terms of the proposed contract on that date and on other occasions but subsequently violated Section 8(a)(5) of the National Labor Relations Act by withdrawing recognition and refusing to bargain. In

---

[4] The dates of the letters and the effective dates of replacement are as follows:

Ronald Blood—October 4, 1978—effective October 4, 1978

Patrick J. Cullinan—October 30, 1978—effective October 30, 1978

Anthony Hynous—October 30, 1978—effective October 30, 1978

Michael Stern—October 30, 1978—effective October 30, 1978

Edward Wagner—October 3, 1978—effective September 18, 1978

Lawrence Weigman—October 3, 1978—effective October 2, 1978.

addition, the ALJ found that the strike which began on September 12, 1978, resulted directly from the Company's withdrawal of recognition and was thus an unfair labor practice strike. By discriminatorily discharging six employees for their involvement in that strike, the Company violated Sections 8(a)(3) and 8(a)(1) of the Act. The ALJ also concluded that a separate 8(a)(1) violation occurred when a company executive interrogated two employees about their Union activity.[5]

On October 5, 1979, the Board issued an order adopting the findings and recommendations of the Administrative Law Judge. The order instructed Lyon & Ryan Ford, Inc., to bargain with the Union on request and to reinstate the six discharged employees with backpay from the date of their discharge letters, even if this required the release of replacement employees. The Company was also ordered to cease and desist from engaging in further violations and to post appropriate notices. The Board subsequently petitioned this Court for enforcement of the order.

II.

The scope of judicial review accorded to an NLRB order upon petition for enforcement is appropriately narrow. The National Labor Relations Act specifically directs that "the findings of the Board with respect to questions of fact if supported by substantial evidence on the record as a whole shall be conclusive." 29 U.S.C. § 160(e). Our inquiry is thus limited to determining whether the record in its entirety provides a proper basis for the Board's decision. Although all evidence which fairly detracts from the weight of the Board's decision must be considered, it is not our function to substitute our judgment for that of the Board when its judgment is supported by substantial evidence on the record as a whole. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); *NLRB v. Mars Sales &*

[5] This Section 8(a)(1) violation is not contested on appeal.

Equipment Co., 626 F.2d 567 (7th Cir. 1980); *Altemose Constr. Co. v. NLRB*, 514 F.2d 8 (3d Cir. 1975).

A. The Section 8(a)(5) Violation

The National Labor Relations Act authorizes two methods for the establishment of a binding bargaining relationship between an employer and a labor union. 29 U.S.C. § 159(a). Generally, NLRB certification of a union's success in an election is the more prevalent practice, but it is not the only route by which a union may acquire the status of bargaining representative. *NLRB v. Newspapers, Inc.*, 515 F.2d 334 (5th Cir. 1975). An employer's voluntary recognition of a majority union remains "a favored element of national labor policy." *NLRB v. Broadmoor Lumber Co.*, 578 F.2d 238, 241 (9th Cir. 1978). An employer who has not committed unfair labor practices and has not recognized a union has the right to require an election regardless of the union's showing of majority status. But once the employer recognizes the union, no matter how informally, he loses the right to require an election. *NLRB v. Brown & Connolly, Inc.*, 593 F.2d 1373 (1st Cir. 1979); *NLRB v. Gogin*, 575 F.2d 596 (7th Cir. 1978). The essence of voluntary recognition is the "commitment of the employer to bargain upon some demonstrable showing of majority [status] . . . . Once that commitment [is] made, [the employer cannot] unilaterally withdraw its recognition and to do so [is] a violation of the Act." *Jerr-Dan Corp.*, 237 NLRB 302, 303 (1978), *enforced*, 601 F.2d 575 (3d Cir. 1979). *Accord, Brown & Connolly*, 593 F.2d at 1374; *NLRB v. A. Lasaponara & Sons, Inc.*, 541 F.2d 992 (2d Cir. 1976), *cert. denied*, 430 U.S. 914 (1977); *Toltec Metals, Inc. v. NLRB*, 490 F.2d 1122 (3d Cir. 1974).

In the present case, the record substantially supports the Board's conclusion that the Company recognized the Union as majority representative of its mechanics, semi-skilled, apprentices, bodymen and painters when Larry Ryan checked the employees' union authorization cards

and membership applications on August 24, 1978.[6] At this initial meeting with Union representatives, Ryan also examined a copy of the proposed contract and discussed various contractual provisions. He voiced no objection to the Union as a properly designated bargaining representative, and negotiations continued at a second meeting several days later, in which the parties compared Union contractual provisions with current company policy and considered the job classification of employees within the proposed bargaining unit. After scheduling a third meeting to settle differences over the inclusion of two employees in the bargaining unit, Larry Ryan gave the Union representatives permission to speak to employees during working hours. This course of conduct is consistent with, and indicative of, the commitment necessary to create a bargaining relationship and warranted a finding by the Board that the Company had recognized the Union as the employees' bargaining agent.

The Company argues, however, that Ryan never recognized the Union, first, because the parties failed to agree on an appropriate bargaining unit, and second, because the Union did not represent a majority of the required employees.[7] It is undisputed that identification

[6] The Company questions the finding that Ryan examined the cards at the August 24th meeting by pointing to an alleged conflict in the testimony of the two Union representatives. According to the Company, "one [of the representatives] stated that the cards were offered to Mr. Ryan in response to his questions concerning the composition of the unit they claimed to represent, . . . and the other implied that Mr. Ryan's question was more in the nature of a demand for proof of majority status." Respondent's Br. at 17. In view of the Company's statement that "Both Union representatives testified that Mr. Ryan looked at each card handed to him [at the first meeting]", we find no meaningful conflict in this testimony which would cast doubt upon the Board's finding that Ryan examined the cards on August 24th. *See* Respondent's Br. at 5.

[7] The Company also attempts to justify its withdrawal of recognition on the basis of the Supreme Court's decision in

(Footnote continued on following page)

of an appropriate bargaining unit is a prerequisite to the determination of a union's majority status. *NLRB v. SAC Constr. Co.*, 603 F.2d 1155 (5th Cir. 1979). In the instant case, both the ALJ and the Board concluded that the parties were in agreement as to the definition of the unit. Neither party disputes the fact that the Union demanded recognition as the bargaining agent only for the dealership's "mechanics, bodymen, painters, semi-skilled and apprentices." In response to specific questions from Larry Ryan, Union representatives stated that they represented only "people who turn wrenches, not anybody else." The "parts people, the chasers, the parts chasers, the car washers and the hikers" were expressly excluded. Ryan made no objection to the scope of the unit at any time during these discussions.

The issue of job classification was discussed in greater detail at the second meeting between the parties. Union representatives explained that in a "new" shop, the employees classified themselves by describing the job they were hired to fill. Final classification, however, remained a subject of negotiation. When Ryan and Union representatives examined the job description on each em-

---

[7] *continued*

Linden Lumber Div., Summer & Co. v. NLRB, 419 U.S. 301 (1974), which held that an employer had the right to refuse to recognize the union and to request an election on the basis of a proffered card majority. In *Linden*, however, the Court carefully noted that the employer and the union "had never voluntarily agreed upon any mutually acceptable and legally permissible means other than a Board conducted election for resolving the issue of union majority status." *Id.* at 310 n. 10. Since the Court expressly reserved the question whether a union which possessed a card majority was required to submit to an election "if the employer breache[d] his agreement to permit majority status to be determined by means other than a Board election," the *Linden* decision is not controlling here. Once an employer has voluntarily recognized a union, he loses his right to require an election. *NLRB v. Brown & Connolly, Inc.*, 593 F.2d 1373 (1st Cir. 1979); *NLRB v. Gogin*, 575 F.2d 596 (7th Cir. 1978); *NLRB v. A. Lasaponara & Sons, Inc.*, 541 F.2d 992 (2d Cir. 1976); *Toltec Metals, Inc. v. NLRB*, 490 F.2d 1122 (3d Cir. 1974).

ployee's authorization card, agreement was reached on the classification of nine mechanics, semi-skilled and apprentices, but Ryan objected to the inclusion of Gary Wilke, a detailer, and Mark Mantsch, a wash boy, in the unit. The Company now contends that the Union's attempt to include these individuals in the bargaining unit "created confusion about the overall scope of the unit sought and made it apparent that, in the context of the realities of Respondent's employee situation, the Union's definition of the unit was ambiguous." Respondent's Br. at 24. Since a union request to bargain on behalf of an ambiguously defined unit may be fatally defective, the Company claims that Ryan never recognized the Union.

The Company's argument is unpersuasive. The fact that the parties failed to agree on the inclusion within the unit of two employees does not necessarily prove that the parties failed to agree substantially on the definition or scope of the unit. In *National Can Corp. v. NLRB*, 374 F.2d 796 (7th Cir. 1967), this court explained, "once having defined the unit it claims to represent and having made a bargaining demand on that basis, the Union has thereby established the frame of reference for measuring the validity of its demand." *Id.* at 801. Here, the Union clearly defined the unit it sought to represent as "mechanics, bodymen, painters, semi-skilled and apprentices" and made a bargaining demand on the basis of authorization cards from a majority of employees in those categories.

While it is true that the Board usually groups all employees in an automotive service department into a single bargaining unit, (*see, e.g., Graneto-Datsun*, 203 NLRB 550 (1973)), a smaller unit is acceptable if it has been agreed to by the parties and is not repugnant to the National Labor Relations Act. *Otis Hospital, Inc.*, 219 NLRB 164 (1975); *Harvey Russell*, 145 NLRB 1486 (1964). The Union in this case was a party to over three hundred similar agreements with Chicago area auto dealerships, and all but two of these agreements covered the same scope of bargaining unit as defined here. The

existence of these comparable units tends to negate any claim that the failure to include all automotive service personnel in the particular bargaining unit in the instant case creates any fatal frailties in the definition of the unit.

Moreover, there was substantial evidence in this case to support the Board's conclusion that the parties agreed to the smaller bargaining unit. The Company not only failed to make any objection to the scope of the unit, but also negotiated with the Union over membership within that unit. The Board has long sought to encourage parties to agree voluntarily to the coverage of an appropriate bargaining unit. *NLRB v. Chelsea Clock Co.*, 411 F.2d 189 (1st Cir. 1969). The salutary purpose of such agreements would be frustrated if, once concluded, the parties were free to repudiate them at will. In the absence of extraordinary circumstances or a clear denial of employees' rights, neither of which are present in the instant case, we cannot sanction the subsequent repudiation of a Union's right to bargain on behalf of a smaller, yet otherwise appropriate, bargaining unit which has received the Company's implicit approval.

The Company also claims that the Board erred in concluding that Larry Ryan recognized the Union on August 24th because the Union failed to properly demonstrate its majority status. According to the Company, Ryan never examined the employees' authorization cards at the initial meeting with Union representatives. This argument relies primarily on the testimony of witness Michael Stern, a former Lyon & Ryan employee. At the hearing before the ALJ, Stern testified that he attended a Union organizational meeting on the evening of *August 28th* (well after August 22nd) with ten or eleven of the dealership's employees, and all of the employees present then signed union authorization cards. Stern explained further that one of the employees whose signed card had been included in the evidence before the ALJ was not present at the card-signing meeting on *August 28th*. The ALJ credited that portion of Stern's testimony which related to the absent employee and refused to count the employee's card when determining

the Union's majority status. Stern's testimony was discredited, however, insofar as it indicated that the cards were not signed on August 22nd, the date indicated on the cards. The Company suggests that the ALJ arbitrarily selected those portions of Stern's testimony which supported the ALJ's conclusion and ignored the rest.

This court accords great weight to the credibility determinations of an administrative law judge, which are based on the first hand observations of a witness' demeanor. *NLRB v. Blue Hills Cemetery, Inc.*, 567 F.2d 529 (1st Cir. 1977). In reviewing the ALJ's findings, however, this court should consider "the consistency and inherent probability of the testimony." *Universal Camera Corp.*, 340 U.S. at 496. We conclude that the discredited portions of Stern's testimony are directly contrary to the testimony of other witnesses and inherently improbable. The ALJ based his finding that the authorization cards were signed prior to the August 24th meeting on three factors: 1) the testimony of Union representatives Donald Carlson and Ed Vaughn; 2) the testimony of Company employee Anthony Hynous, which corroborated the Union representatives' testimony as to the dates of the organizational meetings; and 3) the dates entered on the cards themselves. It is not this court's function to second guess the ALJ or to retry the case on appeal when substantial evidence supports the administrative determination. After reviewing the record, we conclude that the factors outlined by the ALJ satisfy the substantial evidence test and adequately resolve any doubts raised by contrary testimony or inferences.

The course of conduct pursued by the Company following the Union's demand for recognition on August 24th supports the Board's finding that a bargaining relationship had been established. After voluntarily recognizing the Union, the Company was obligated to bargain for a reasonable period so that the relationship could be given a fair chance to succeed. *Franks Bros. v. NLRB*, 321 U.S. 702, 706 (1944). We believe that three meetings in seven days does not exhaust the requirement for bargaining over a reasonable period. Hence, we accept the Board's finding that the Company's request for a

federal election on September 1, 1978, constituted a withdrawal of recognition and a refusal to bargain in violation of Section 8(a)(5) and enforce that portion of the Board's order.

B. The Section 8(a)(3) Violation

After the Company's unlawful withdrawal of recognition and refusal to bargain on September 1st, Union representatives informed Ryan that the employees would strike if they did not have a signed contract by September 12th. When no contract was forthcoming, eleven Company employees struck and picketed the dealership. Less than a month later, several of the strikers received letters from the Company stating that a replacement employee had been hired and that the Company had "no intention" of recalling the striking employee to work at the end of the labor dispute.

After examining the ALJ's report, the Board concluded that the strike was "caused and prolonged" by the Company's withdrawal of recognition and refusal to bargain. A strike which is caused in whole or in part by an employer's unfair labor practice is an unfair labor practice strike. *NLRB v. My Store, Inc.*, 345 F.2d 494 (7th Cir.), *cert. denied*, 382 U.S. 927 (1965); *NLRB v. Waukesha Lime & Stone Co.*, 343 F.2d 504 (7th Cir. 1965). Unlike employees who strike for economic reasons, unfair labor practice strikers "do not lose their [employee] status and are entitled to reinstatement with backpay, even if replacements for them have been made." *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956). The Board therefore concluded that the letters which stated that the Company had no intention of recalling the strikers constituted notices of discharge and violated Section 8(a)(3) and (1) of the Act.

In these enforcement proceedings the Company contends that the Board erred by ignoring evidence of the Union's express purpose in calling the strike. Relying on the testimony of a Union representative which indicated that the employees picket signs read, "On Strike for Recognition," the Company argues that the Board

failed to accord proper weight to the Union's own characterization of the strike. The Company contends that in *Drug Package, Inc. v. NLRB*, 570 F.2d 1340 (8th Cir. 1978), *on remand*, 241 NLRB No. 44 (1979), *petition den. sub nom. Willenbrunk v. NLRB*, 612 F.2d 1088 (8th Cir. 1980), the court considered both the availability and use of picket signs bearing slogans indicating that union recognition had not taken place and rejected the Board's determination that a strike should be characterized as arising out of an unfair labor practice.

We are, however, unpersuaded by the Company's argument. A strike may be an unfair labor practice strike even though it contains some recognitional objectives. *Larand Leisurelies, Inc. v. NLRB*, 523 F.2d 814, 820 (6th Cir. 1975); *NLRB v. Juniata Packing Co.*, 464 F.2d 153, 155 (3d Cir. 1972). Contrary to the Company's assertion, the *Drug Package* court did not reject the finding of an unfair labor practice strike because of the Union's picket sign slogans. Instead, the court, having reversed the Board's 8(a)(5) finding, concluded that, "without that crucial element [an 8(a)(5) violation], the strike cannot be deemed an unfair labor practice strike." *Drug Package*, 570 F.2d at 1348. In the instant case, on the other hand, we have accepted the Board's determination of a Section 8(a)(5) violation. After a thorough review of the record, we also conclude that substantial evidence supports the Board's finding that the strike, although perhaps seeking some recognitional objectives, was primarily caused by the Company's unlawful withdrawal of recognition and refusal to bargain.

Finally, the Company objects to the Board's conclusion that the dealership permanently discharged and refused to reinstate six striking employees in violation of Section 8(a)(3) and (1). The Company claims that the Board failed to articulate any basis for this finding. It is the Company's position that the letter sent to the employees represented notice of replacement to economic strikers rather than notice of discharge to unfair labor practice strikers.

Having concluded that the employees were participating in a bona fide unfair labor practice strike, we need only determine whether substantial evidence supports the Board's conclusion that the letters constituted notice of discharge. The pertinent portions of the letter stated, "we have hired an individual who will replace you on our work force. Accordingly, it will not be our intention to recall you to work at the conclusion of our labor dispute inasmuch as the new employee will be taking your place." While the letter carefully avoids using the words, "discharged," "fired," or "terminated," we think the Company's purpose is clear. By indicating that the employee would not be recalled, the Company emphasized that a request for reinstatement would be futile. Under the facts of the instant case, there is no meaningful distinction between discharging an employee and permanently replacing him. Thus, the record fully supports the Board's determination that the Company discharged six unfair labor practice strikers in violation of Section 8(a)(3) and (1).

III.

Section 10(c) of the National Labor Relations Act directs the Board to develop remedies which will carry out the policies of the Act. *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953). Since the relation of remedy to policy in the field of unfair labor practices is a matter within the Board's particular experience and administrative competence, the courts accord wide discretion to the Board in this area. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). "Unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act," the Board's determination will be affirmed. *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943).

In the present case, the Board, relying on its decision in *Abilities & Goodwill, Inc.*, 241 NLRB No. 5 (1979), ordered the Company to reinstate the six unlawfully discharged employees with backpay from the date of dis-

charge. The Company responds that this remedy, the imposition of which overrules more than thirty years of Board precedent with respect to strikers, improperly places an unreasonable burden on the employer and should be set aside. Because we think the Board could reasonably conclude that its former policy, which had the effect of sanctioning disparate treatment as between discriminatorily discharged working employees and discriminatorily discharged striking employees, is inequitable and inadequate, we affirm the Board's backpay order.

The discretion accorded the Board in devising appropriate remedies for labor violations has been most evident with respect to backpay awards. Rather than relying on rigid formulas, the Board has tried to use a more flexible approach "to attain just results in diverse, complicated situations." *Phelps*, 313 U.S. at 198. In each case, the "just result" represents "a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination." *Id.* at 194.

In the case of an unlawfully discharged working employee, a "just result" requires reinstatement and backpay from the date of discharge. No request for reinstatement was necessary because the Board reasoned that such a plea would fall on deaf ears. Generally, an employer would not voluntarily grant a request to rehire an individual whom he had just fired. In addition, the Board believed that the employer, who unlawfully discharged the employee in the first place, bore the onus of undoing the damage by offering the employee immediate reinstatement and reimbursement for all losses suffered from the date of the discriminatory action.

A different rule controlled, however, when the Board considered the case of an unlawfully discharged striking employee. In the absence of an unconditional offer by the employee to return to work, a "just result" included reinstatement but no backpay. For many years, this rule was applied as "established Board precedent"

although it enjoyed less than unanimous Board approval.[8]

In *Abilities & Goodwill*, the Board (with members Pennello and Murphy dissenting) announced a change in the policy governing backpay awards. The Board declared "a discharged striker is a discharged employee and entitled to be treated as such, for there is nothing peculiar to a strike which justifies dissimilar treatment. The nature of the employer's unlawful conduct is not changed by the fact that the employee happens to be a striker at the time of discharge." *Goodwill* at 3. As a result, the Board concluded that an unlawfully discharged striker is no longer required to request reinstatement to trigger an employer's backpay obligation.

The Company argues, however, that the *Abilities & Goodwill* remedy is inappropriate because the employer who discharges a striking employee cannot aptly be termed a "wrongdoer." After all, the Company contends, the employees would not have been "permanently replaced" if they had not engaged in the strike. This argument highlights the ambiguity inherent in the discharge of a striker. As this court recently explained:

> On the one hand, the employee may voluntarily be refraining from work, as evidenced by the fact that he was initially on strike. [I]n this case, a back pay award would more than make him whole for his unlawful discharge and thus would not be consistent

[8] *See, e.g., Bartlett-Collins Co.*, 230 NLRB 144 (1977); *Michael Muldoon Elder, d/b/a Vorpal Galleries*, 227 NLRB 446 (1976); *Valley Oil Co., Inc.*, 210 NLRB 370 (1974); *Roosevelt Roofing and Sheet Metal Works, Inc.*, 204 NLRB 671 (1973); *Astro Electronics, Inc.*, 188 NLRB 572 (1971); *Universal Services, Inc.*, 184 NLRB 381 (1970); *Sea-Way Distributing, Inc.*, 143 NLRB 460 (1963); *Elm Tree Baking Co.*, 139 NLRB 4 (1962); *Sea View Industries, Inc.*, 127 NLRB 1402 (1960); *Wheatland Electric Cooperative, Inc.*, 102 NLRB 1119 (1953); *National Gas Co.*, 99 NLRB 273 (1952); *Happ Brothers, Inc.*, 90 NLRB 1513 (1950); *Kallaher and Mee, Inc.*, 87 NLRB 410 (1949); *Massey Gin and Machine Works, Inc.*, 78 NLRB 189 (1948).

> with the remedial purposes of the Act. *See Republic Steel Corp. v. NLRB*, 311 U.S. 7 . . . (1940). On the other hand, the employee may not have returned to work because of the unlawful discharge, thinking it futile to even ask to be reinstated.

NLRB v. Mars Sales & Equipment Co., 626 F.2d 567, 574 (7th Cir. 1980). Rather than requiring the discharged employee to engage in the presumably futile act of requesting reinstatement, we believe that the ambiguity may be resolved against the employer who committed the unfair labor practice. The employer is thus liable for backpay unless he can affirmatively establish that the unlawful discharge did not prevent the employee from returning to work.[9]

This result is not as onerous as it may appear. As in the case of any discharged employee, the employer must make an offer of reinstatement. If the striking employee thereafter refuses to return to work, the employer's position is vindicated and his backpay obligation is tolled. When the employee willfully withholds his services, the employer is thus not responsible for his corresponding loss of earnings. Even where an employer fails to offer reinstatement, he is entitled to reduce his backpay liability by presenting evidence that the employee would have refused the reinstatement offer had it been made.

Moreover, the policy we enforce here is not so much an abrupt departure from Board precedent as it is the

---

[9] We implicitly accepted this remedy in *NLRB v. Mars Sales & Equipment Co.*, 626 F.2d 567 (7th Cir. 1980). In that case, the Board found that the Company violated Sections 8(a)(1) and (3) by discharging two employees, Metzger and Neaville, who were participating in an economic strike. Since permanent replacements had not been hired for these individuals at the time they were discharged, the Board ordered the Company to offer reinstatement to both employees with backpay from the date of their unlawful discharge. We enforced the Board's order as to employee Neaville because it was "consistent with the remedial policies of the Act." *Id.* at 574. We declined to enforce the Board's order as to employee Metzger, however, because Metzger had resigned from the Company during the strike.

natural evolution of the Board's efforts over the years to achieve a "just result." Several years prior to *Abilities & Goodwill*, the Board created a futility exception to the reinstatement rule for discharged strikers. Under this exception, if evidence indicated that a request for reinstatement would be futile, the striker was entitled to reinstatement with backpay even if no request had been made. *See, e.g., Sigma Service Corp.*, 230 NLRB 316 (1977); *Valley Oil Co., Inc.*, 210 NLRB 370 (1974). It was neither unreasonable nor unforeseeable that the Board should elect to extend this exception by creating a presumption of apparent finality of discharge in strike situations. It would appear to be a rare case where a reinstatement request by a striking employee who had just been fired would *not* be futile. Since the backpay award for unlawfully discharged working employees is based on an identical presumption of futility, the reasons for distinguishing logically between the two situations tend to disappear. Particularly in the instant case, where the employer unlawfully discharged employees for participating in a strike caused by the employer's unlawful withdrawal of recognition and refusal to bargain, we see no reason to deny these employees reinstatement with backpay from the date of discharge. We emphasize, however, that essentially our conclusion only supports the Board's exercise of discretion and that some other result, if arrived at by the Board pursuant to the Act, might also in the appropriate circumstances be quite defensible.

Finally, the Company argues that the Board's retroactive application of the remedy announced in *Abilities & Goodwill* was improper because the strikers were discharged *before* the new backpay policy had been announced. We decline to adopt an unnecessary limitation on a policy which not only rectifies an apparent disparity in the treatment of discharged employees but which was also not an unforeshadowed departure by the Board from its prior line of decisions.

Generally, a decision which changes existing law or policy is given retroactive effect unless retroactive application would cause "manifest injustice." *Chevron*

Oil Co. v. Huson, 404 U.S. 97 (1971). The Supreme Court has devised a three part test to identify situations in which a civil, nonconstitutional precedent should be applied on a prospective basis only:

1) Does the decision "establish a new principle of law, either by overruling clear past precedent on which the litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed?"

2) Considering "the prior history of the rule in question, its purpose and effect," does retroactive application "further or retard" the operation of the rule?

3) Does retroactive application create "injustice or hardship" for one of the parties?

Chevron Oil Co. v. Huson, 404 U.S. 106-07 (1971). Since there is a presumption favoring retroactivity, all three *Chevron* factors must support prospective application in order to limit the retroactive effect of the decision. *Valencia v. Anderson Bros. Ford*, 617 F.2d 1278, 1289 (7th Cir.), *cert. granted*, 49 U.S. L.W. 3196 (1980) (No. 80-84); *Schaefer v. First Nat'l Bank*, 509 F.2d 1287, 1294 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976).

In the instant case, the matter seems settled for us because the new rule was not an unforeshadowed departure from the Board's previously existing practice, and the Board has sufficiently demonstrated a basis for its view that retroactive application will further rather than retard the operation of the rule. In addition, retroactive application will not create substantial injustice or undue hardship for either party. The Board finds no valid reason for distinguishing between the status of an unlawfully discharged striker and of an unlawfully discharged working employee. Contrary to the Company's claim, the rule enforced here does not provide a windfall to striking employees but merely places the burden of undoing the wrong on the wrongdoer, where it seems properly to belong.

For the foregoing reasons, we grant enforcement of the Board's order.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 4969—Midwest Law Printing Co., Inc., Chicago—4-24-81—350

246 NLRB No. 2 D--5745
Antioch, IL

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

LYON & RYAN FORD, INC.

and Case 13-CA-18104

AUTOMOBILE MECHANICS LOCAL 701,
INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
AFL--CIO

DECISION AND ORDER

On July 17, 1979, Administrative Law Judge J. Pargen Robertson issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this

proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.

1/ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

2/ Member Murphy agrees with the Administrative Law Judge's conclusions that any unconditional offer to return to work made by the discharged unfair labor practice strikers would have been futile. Accordingly, she would find that Respondent's backpay liability runs from the date of the termination of the strike. See the dissenting opinion of Member Penello

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Lyon & Ryan Ford, Inc., Antioch, Illinois its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. October 5, 1979

John H. Fanning, Chairman

Howard Jenkins, Jr., Member

Betty Southard Murphy, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

2/ continued

and Murphy in Abilities and Goodwill, Inc., 241 NLRB No. 5 (1979).

JD-427-79
Chicago, IL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

LYON & RYAN FORD, INC.

and Case 13-CA-18104

AUTOMOBILE MECHANICS LOCAL 701,
INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
AFL-CIO

Arly Eggertson, Esq., for the
General Counsel.
Sheldon M. Charone, Esq., for
the Charging Party.
James Hendricks, Esq. and
Michael Havrilesko, Esq.,
for the Respondent.

DECISION

Statement of the Case

J. PARGEN ROBERTSON, Administrative Law Judge: This case was heard at Chicago, Illinois, on April 11, 1979. The complaint, which issued on November 15, 1978 and was amended at the hearing, is

predicated on a charge filed on October 10, 1978.

The complaint, as amended, alleges Respondent violated Section 8(a)(1) of the Act by interrogating its employees concerning the Union; Section 8(a)(5) by withdrawing recognition of the Union as exclusive bargaining representative of certain employees; and Section 8(a)(3) by discharging six employees that engaged in an unfair labor practice strike.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of General Counsel, Charging Party and Respondent. Upon the entire record and from my observation of the witnesses and their demeanor, I make the following:

Findings and Conclusions

1. Commerce

Respondent admitted and I find that it is an employer engaged in commerce within the meaning of the Act.

2. Labor Organization

Automobile Mechanics Local 701, International Association of Machinists and Aerospace Workers, AFL-CIO, is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

3. The Evidence

On August 22, 1978, at the second of two meetings between Union Business Representative Donald Carlson and employees of Respondent, ten 1/ of those employees

1/ Eleven cards were received into evidence with testimony that all eleven were signed at the August 22 meeting. However, one of General Counsel's witnesses testified that one of the alleged signers, Mark Mantsch, was

signed union authorization cards and applications for Union membership. The authorization cards specified:

> I, the undersigned, ** hereby authorize the International Association of Machinists and Aerospace Workers (IAM) to act as my collective bargaining agent with the company for wages, hours and working conditions.

On August 24, Union Representatives Carlson and Ed Vaughn went to Respondent's facility and met with Respondent President Larry Ryan. After introducing themselves, Carlson and Vaughn were asked into Ryan's

1/ (Continued) not at the August 22 meeting. In view of that testimony I shall not count Mantsch's card for purposes of determining the majority issue. North Miami Convalescent Home, 224 NLRB 1271.

Respondent contends that the evidence demonstrates the application and authorization cards were signed after August 22. However, cards were signed on the date reflected thereon, August 22. The testimony of Donald Carlson and Anthony Hynous, in addition to the cards, reflect they were all signed on August 22.

office where only the three of them were present. Carlson told Ryan they had signed up a majority of his employees that come under their jurisdiction, namely mechanics, semi-skilled and apprentices, bodymen and painters, and they were there to negotiate a contract. Carlson handed Ryan a letter saying the original copy of the letter was in the mail to Ryan. The letter, which was dated August 22, 1978, demanded recognition of the Union as bargaining representative of the before-mentioned employees and asserted that the Union represented a majority of those employees. Carlson explained that his Union traditionally sought to represent only those employees "who turn wrenches, not anybody else." Ryan asked who Carlson was talking about. Carlson asked if Ryan wanted to see the employees' cards and applications. Ryan indicated he did and

Carlson handed Ryan the 11 signed authorization cards and the 11 signed membership applications. Ryan went through the cards one-by-one. Carlson gave Ryan a copy of the recently expired master contract for the Chicago area along with a voting information sheet which listed the changes that would be included in the new master contract. Carlson explained that the new contract had not been printed. At that point Carlson briefly went over the master contract and explained several of the provisions. When they reached the welfare and pension program, Ryan asked what was the current cost. When Carlson replied $30 per week per man for both health and welfare and pension, Ryan turned and punched out some numbers on his adding machine. Ryan then asked about coverage if an employee was hurt on a Company picnic. Carlson said an employee may be

covered by workmen's compensation in that situation but if not, the insurance would pick up the cost. They then went over the wage scale. Carlson testified that the Company had already gone over to their contractural rate on booked hours of $9.35 for the first 40 booked hours and $10.35 for hours thereafter. Therefore, under those wages Carlson pointed out, they weren't far apart on wages. At that point the meeting concluded with Carlson asking for another meeting. 2/

2/ Larry Ryan admitted meeting with Carlson and Vaughn but denied checking the authorization and application cards. He admitted receiving a copy of the expired contract and voting information sheet during Carlson's and Vaughn's visits to his office but denied discussing the terms of those documents. I was not impressed with the demeanor of Mr. Ryan or of his son Patrick Ryan who testified regarding the second and third visits Carlson and Vaughn made to Ryan's office. I found Carlson and Vaughn to be more open and cooperative on cross and their testimony appeared more logical

On August 28, 1978, Carlson and Vaughn again met with Ryan. On that occasion Patrick Ryan, general manager and Larry's son, was also present. Again the parties discussed the master contract. Larry Ryan asked what could be done if he overpaid an employee for vacation. Carlson replied it could be taken back if done within a reasonable time. The discussion developed that Ryan may be providing better vacation benefits than the contract

2/ (Continued) under the circumstances. Also there were noticable conflicts between Larry and Patrick Ryan, the most notable involving the authorization and application cards. Patrick Ryan identified the cards as being in Carlson's possession during their second meeting until Carlson placed them on Larry Ryan's desk. Larry Ryan admitted Carlson placed some cards on his desk but he was positive they were not the authorization and application cards. Therefore I have discredited the testimony of Larry and Patrick Ryan to the extent it conflicts with the testimony of Carlson and Vaughn.

and Carlson said he would take the good with the bad and go with a straight "701 contract." The parties then got into job classifications of specific employees on an employee by employee basis. The employees were all classified as mechanics, apprentices or semi-skilled except employees Gary Wilke and Mark Mantsch. Larry Ryan explained that Wilke was a detailer and that he cleaned up and readied used cars. He explained Mark Mantsch was hired as a wash boy, but had been doing mechanical work under one of the mechanics. Subsequently, Carlson went through each application card and read out five employees he identified as journeymen and four others as either semi-skilled and apprentices into another. He made a third pile including Mark Mantsch and Gary Wilke, saying "we had a problem what they're going to be and if they would be in the

unit." After this the parties discussed the balance required between mechanics and semi-skilled and apprentices and Carlson gave examples of what the situation was at some of the other dealers. As the meeting closed Carlson requested another meeting stating that it looks like we have got at least two that haven't been settled. Carlson asked and was permitted to go into the shop and talk to some of the employees at the close of the meeting.

Another meeting was arranged for September 1, 1978. When Carlson and Vaughn arrived Larry Ryan said he wanted a Federal election. Carlson replied he was disappointed with that decision, he thought everything was going along fine with the "exclusion" of two people. Carlson said he didn't have time or need for an election. He told Ryan, "You have seen all the applications, the cards, we have

discussed the contract, classifications and I am disappointed, ** we are going to Cincinnati for one week we would be back on the 11th and if we don't have a signed contract by the 12th there will be a work stoppage." Ryan asked to make a phone call. After a few minutes Ryan returned and acknowledged the Union could strike but, he said, they wouldn't.

Subsequently, on September 1, Carlson and Vaughn met some of the employees. Carlson told the employees what had happened in their meeting that day, that "the employer made a complete reversal after it looked so good and ** wanted an election, a Federal election. ** as of the 12th if we don't have a contract be prepared to go on the street."

On September 12, 11 of Respondent's employees struck and picketed Respondent's premises. During October 1978,

Respondent sent employees Ronald Blood, Patrick Cullinan, Anthony Hynous, Michael Stern, Edward Wagner and Lawrence Wiegman the following letter:

> This letter is to inform you that effective _____ we have hired an individual who will replace you on our work force. Accordingly it will not be our intention to recall you to work at the conclusion of our labor dispute, in as much as the new employee will be taking your place.

Additionally, General Counsel alleges that by interrogating employees Anthony Hynous and Michael Stern on or about September 1, Respondent, by Patrick Ryan, violated Section 8(a)(1). Hynous testified that shortly after a August 28, union meeting, he had a conversation with Patrick Ryan at his work station. Ryan asked "what our circumstances with the union were." Hynous replied they had approached the Union basically for better benefits. Ryan asked if more money would

do and Hynous replied they would have to evaluate that. Ryan commented that he guessed he had some talking to do. Stern had a conversation with Patrick Ryan in Ryan's office around August 29. Ryan asked what Stern thought of the Union. Stern replied it sounds good and the Union was something they wanted. Ryan asked if money would make the difference and Stern replied he really didn't know. 3/

4. Conclusions

The credited evidence reveals that on August 24, 1978, the Union demanded recognition as exclusive bargaining representative of Respondent's "mechanics, bodymen,

3/ I was impressed with the demeanor of both Anthony Hynous and Michael Stern. Both appeared candid and cooperative on direct and cross-examination. Although Patrick Ryan denied the testimony of interrogations, I discredit his denial and credit the versions of Hynous and Stern.

painters, semi-skilled and apprentices." Respondent, in opposition to General Counsel and the Union, contends the appropriate unit would include not only mechanics, bodymen, painters, semi-skilled and apprentices but also partsmen, porters, service writers, undercoaters, new and used car get-ready men, preparation and detail men, janitors and utility laborers.

In examining the questions before me, I need not consider whether the unit sought by Respondent is appropriate or more appropriate than the unit sought by the Union. My consideration is limited to consideration of whether the unit which the Union seeks is an appropriate bargaining unit. I have determined that it is an appropriate unit.

The evidence is not in dispute that the unit the Union sought is the same basic unit covered by the master or standard

agreement between the Union and various employers in the Chicago area. The Union is party to over 300 agreements and all but two cover the same bargaining unit sought here. The two exceptions involve units inherited by the Union from another labor organization where the other labor organization negotiated different units. It is the practice in the Chicago area for the additional classifications not sought by Respondent to be included in a unit traditionally represented by another union's local.

The cases do indicate that the Board, especially when considering the question in representation case proceedings, has an established practice of finding all employees of an automotive service department to be a single appropriate unit (e.g., Graneto-Datsun, 203 NLRB 550 (1973). However, the Board has long endeavored to

give the parties "the broadest permissible latitude to mutally define the context in which collective bargaining should take place." Its stated policy is "to encourage the practice and procedure of collective bargaining. Such a policy demands that questions preliminary to the establishment of the bargaining relationship be expediously resolved" (Otis Hospital, Inc., 219 NLRB 164 (1975)). 4/ In pursuit of that stated policy the Board has consistently refused to insist on imposing a more comprehensive unit where the parties have agreed to a smaller unit provided that the smaller unit is not repugnant to the requirements of the Act. Under those circumstances the Board has not interfered with the orderly and prompt collective bargaining process by permitting one party to belatedly renege on its

4/ Harvey Russell, 145 NLRB 1486.

agreement by appealing to the Board to assert its preference for a more comprehensive unit. 5/ Where the parties have agreed to units such as the one sought here, the Board has approved their agreement. 6/ Respondent's president, Larry Ryan, asked the Union if they represented the parts people, the chasers, the parts chasers, the car washers and the hikers. Ryan was told that the Union did not represent those employees. Rather than questioning the Union's representatives further on the unit issue Ryan then asked for proof of majority status. Ryan was shown the authorization and application for union membership cards signed by 11 of his employees. Subsequently, in that first meeting of August 24, the parties

5/ Otis Hospital, Inc., supra; Harvey Russell, supra.

6/ Dick Bullis Chevrolet, 176 NLRB 158 (1969).

went through the proposed contract. Ryan did not pose any disagreement or further questions regarding the unit.

In their second meeting, on August 28, the parties went over the unit employees on an employee-by-employee basis and, with the exception of two employees which the Respondent sought to exclude from the unit, reached agreement on the inclusion of nine mechanics, apprentices and semi-skilled employees.

Under the circumstances it is apparent and I find, that the parties were in agreement as to the unit. 7/ A ruling to the contrary would contravene the Board's

7/ Although specific words evidencing agreement may be lacking, subsequent conduct, including silence, may, as here, constitute an admission, Wigmore on Evidence, Sections 292, 1071, 1072; Jones on Evidence, Fifth Edition, Section 388; McCormick, Handbook on the Law of Evidence, Section 247.

policy of promoting expeditious negotiations. Therefore, I find the unit including mechanics, bodymen, painters, semi-skilled and apprentices to be an appropriate unit.

(i) The majority issue:

According to the testimony of Anthony Hynous, which I credit, Respondent employed approximately 12 employees in the appropriate unit at the time of the Union's demand for recognition in August 1978. Those 12 employees included Ron Blood, mechanic; Pat Cullinan, mechanic; H. Dufern, body man; Anthony Hynous, mechanic; Mark Mantsch, apprentice; John Kalat, mechanic; William Mennonoh, Jr., mechanic; H. Miehlnickel, semi-skilled; Michael Stern, semi-skilled; Larry Wiegman, semi-skilled; Ed Wagner, semi-skilled; and Wally Garver, regular part-time

mechanic. 8/

I find that the following employees signed cards authorizing the Union as their exclusive bargaining representative on August 22, 1978: Ron Blood, Pat Cullinan, Anthony Hynous, John Kalat, William Mennonoh, Jr. (Mennenoh), H.

8/ In determining the job classifications of the 12 specified employees I have considered Joint Exhibit 7, which is the list of employees submitted to the Regional Office by Respondent on October 6, 1978 when it petitioned in 13-RM-1262. Although Respondent argues Joint Exhibit 7 should not be considered to prove job classifications I find that in that regard it constitutes an admission and I shall consider it. In addition to those employees identified by Hynous as being unit employees in August, Joint Exhibit 7 list D. Hart, body shop man; and M. Herrmann, semi-skilled (classifications which fall within the unit description). Joint Exhibit 7 list the following employees in job classifications which do not fall within those included in the unit: C. Jagielo, get ready man; W. Craig, service writer; E. Frazier, part chaser; M. Groth, partsman; E. Hogan, service writer; G. Koziol, partsman; and G. Wilke, get ready man.

Miehlnickel (Muehlnickel), Michael Stern, Larry (Lawrence) Wiegman, Ed Wagner, and Gary Wilke. 9/ Of those 10 card signers the evidence reflects that at least 9 were employed in the bargaining unit on August 22, 1978. Therefore I find that the Union represented a majority of the employees in the unit at material times on and after August 22, 1978. 10/

(ii) The demand and recognition issue:

As indicated above I credit the testimony of witnesses Carlson and Vaughn that pursuant to their demand for recognition made to Larry Ryan on August 24, 1978, Ryan asked to see the authorization and application for union membership cards of his employees. I find that Ryan carefully

9/ The card of Mark Mantsch is not considered, see footnote 1, supra.

10/ A majority exist whether the unit is 12 or 14 as reflected by Joint Exhibit 7.

examined the cards, both authorization and membership application, of employees Ron Blood, Pat Cullinan, Anthony Hynous, Mark Mantsch, 11/ John Kalat, William Mennonoh, Jr., H. Miehlnickel, Michael Stern, Larry Wiegman, Ed Wagner and Gary Wilke.

Respondent contends that despite the above-mentioned evidence it acted legally when it withdrew recognition citing as authority Linden Lumber Division, Sumner & Co. v. N.L.R.B., 419 U.S. 301 (1974). However the Board, whose ruling the Supreme Court affirmed in Linden Lumber, has distinguished that holding from situations similar to the one in this case. In Jerr-

11/ Although Mark Mantsch's card was not counted for purposes of determining majority, I find that an authorization card and an application for membership card, which purport to bear Mantsch's signature were presented to and examined by Larry Ryan on August 24, 1978.

Dan Corp., 12/ the Board stated that Linden Lumber involved a situation where an employer was found not to violate Section 8(a)(5) solely by refusing to accept evidence proffered by the union of majority status. However, where as in Jerr-Dan, an employer acknowledged the union's majority of basis of evidence other than a Board election, a subsequent withdrawal of recognition violates Section 8(a)(5).

> Once voluntary recognition has been granted to a majority union, the union becomes the exclusive collective-bargaining representative of the employees, and withdrawal or reneging from the commitment to recognize before a reasonable time for bargaining has elapsed violates the Employer's bargaining obligation. Evidence that an employer has commenced bargaining or has taken other affirmative action consistent with its recognition of the union aids in resolving the evidentiary question as to whether recognition was granted. However,

12/ 237 NLRB No. 49 (1978).

> once the fact of recognition is established such additional evidence is not required for the bargaining obligation arises upon voluntary recognition and continues until there has been a reasonable opportunity for bargaining to succeed. (Brown & Connolly, Inc., 237 NLRB No. 48 (1978), quoted with approval by the Board in Jerr-Dan Corp., supra.)

The facts indicate and I find that Respondent recognized the Union as majority representative of its mechanics, 13/ semi-skilled, apprentices, bodymen and painters upon Larry Ryan checking the employees' authorization and application for membership cards on August 24. Other evidence which lends support to this finding include Ryan's acceptance and examination of the proposed contract, Ryan's meeting with the Union on three separate occasions, both Larry and Patrick Ryan discussing and negotiating with the Union

13/ See footnote 7, supra.

over the terms of the proposed contract and Respondent authorizing Carlson and Vaughn to go into the service department during working hours to meet with some of the employees following their August 28, meeting with the Ryans. In that respect I credit evidence that following the Union's request for another meeting at the end of their August 24 meeting, Larry Ryan indicated he was available and agreeable to meet again at his office on August 28. Ryan also agreed to and did meet with the Union on September 1, 1978. Following the August 28 meeting Carlson and Vaughn asked the Ryans if they could go out into the shop and see the employees and they were permitted to do so.

Therefore, I find that from August 24, until September 1, 1978, Respondent recognized the Union as exclusive representative of its employees. The Union did in

fact represent a majority of those employees before and during that period. On September 1, Respondent withdrew recognition by demanding that it wanted a Federal election. By its action in withdrawing recognition Respondent violated Section 8(a)(5) of the Act.

(iii) The unfair labor practice strike issue:

Upon Respondent withdrawing recognition on September 1, Business Representative Carlson responded that he was very disappointed in that decision, that he thought everything was going along fine and they didn't have time or see a need for a Federal election. Carlson told Larry and Patrick Ryan that they had seen all the applications and the cards and had discussed the contract and job classifications. Carlson said he was going to Cincinnati for 1 week, returning on

September 11, and that if they didn't have a signed contract by September 12, the employees would strike.

Subsequently Carlson and Vaughn met with two of the unit employees and told them of their September 1, meeting with Respondent. Carlson told the employees that Respondent had made a complete reversal after it looked so good, and now wanted an election. Carlson told the employees that as of the 12th they should be prepared to strike if they didn't have a contract.

Although Carlson reacted to Respondent's changed position by demanding a contract, it is clear that his reaction and the ultimate employees' action on September 12, resulted directly from Respondent withdrawing recognition of the Union. On September 12, 11 of Respondent's employees went on strike and established a picket

line at Respondent's premises. 14/ I am convinced on the basis of the record as a whole that that strike was caused and prolonged by Respondent's unlawful withdrawal of recognition and was an unfair labor practice strike.

(iv) The alleged discharges:

General Counsel alleges that between October 3, and October 30, 1978, Respondent discharged six of its employees because they engaged in the unfair labor practice strike. The evidence is uncontested that Respondent mailed the following letter to those employees because of their involvement in the strike which started on September 12, 1978: 15/

14/ Brooks, Inc., 228 NLRB 1365, 1367 fn. 12 (1977); Pope Maintenance Corporation, 228 NLRB 326, 342 (1977).

15/ The employee, date of the respective letter and its effective date are as follows:
Ronald Blood - October 4, 1978 - effective October 4, 1978.

> This letter is to inform you that effective _____ 16/ we have hired an individual who will replace you on our work force. Accordingly it will not be our intention to recall you to work at the conclusion of our labor dispute, in as much as the new employee will be taking your place.

In each case Respondent's letter reflected that the effective date was on or before the date of the letter, thereby informing the employee that he had already been replaced.

I find in agreement with General Counsel that Respondent's letter constitutes notice of discharge of each of the named

15/ (Continued) Patrick J. Cullinan - October 30, 1978 - effective October 30, 1978.
Anthony Hynous - October 30, 1978 - effective October 30, 1978.
Michael Stern - October 30, 1978 - effective October 30, 1978.
Edward Wagner - October 3, 1978 - effective September 18, 1978.
Lawrence Wiegman - October 3, 1978 - effective October 2, 1978.

16/ Respondent inserted the respective effective date in this space.

employees. By its indication that the employee will not be recalled Respondent informed the employee that any request for reinstatement would be futile. In view of my above findings, and the record as a whole, I find that Respondent's actions in discharging the six employees previously named, because of their involvement in the unfair labor practice strike, violate Section 8(a)(3) of the Act. 17/

(v) The alleged interrogations:

In the total context of this case the credited testimony of Michael Stern and Anthony Hynous reflects clear violations of Section 8(a)(1) in their late August or early September conversations with Patrick Ryan. Stern's conversation was in Ryan's office. Ryan asked Stern what he thought of the Union. Stern replied it

17/ Federal Mogul Corporation, 212 NLRB 950 (1974).

sounds good and the Union is something we want. Ryan asked if money would make the difference and Stern replied he really didn't know. Hynous was asked "what our circumstances with the union were." Hynous replied they had approached the Union basically for better benefits. Ryan asked if more money would do and Hynous replied they would have to evaluate that. Ryan commented that he guessed he had some talking to do. I find that Ryan's comments constitute interrogations in violation of Section 8(a)(1) as alleged by General Counsel.

5. Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Automobile Mechanics Local 701, International Association of Machinists and Aerospace Workers, AFL-CIO, is a labor

organization within the meaning of Section 2(5) of the Act.

3. By interrogating its employees about their union activities on or about August 29, 1978, and September 1, 1978, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. All mechanics, bodymen, painters, apprentices and semi-skilled workers employed at Respondent's facility currently located at 104 - Route 173, Antioch, Illinois, but excluding partsmen, porters, service writers, undercoaters, new and used car get ready men, prep and detail men, janitors, utility laborers, office clerical employees, salesmen, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section

9(b) of the Act.

5. Since August 22, 1978, the above-named labor organization has been and now is the exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

6. By ceasing and refusing to continue to recognize and bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit since September 1, 1978, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

7. Respondent, by engaging in the above-mentioned unfair labor practices, caused and prolonged a concerted work stoppage and strike by various employees

in the above-described unit, commencing on or about September 12, 1978, at Respondent's Antioch, Illinois facility.

8. Respondent by terminating and thereafter refusing to reinstate its employees named below on the dates opposite their respective names, because of their involvement in the above-mentioned strike, has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act:

Edward Wagner - October 3, 1978
Michael Stern - October 30, 1978
Patrick Cullinan - October 30, 1978
Lawrence Wiegman - October 3, 1978
Ronald Blood - October 4, 1978
Anthony Hynous - October 30, 1978

9. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged

in unfair labor practices in violation of Section 8(a)(1), (3) and (5) of the Act, I shall recommend that it be ordered to cease and desist therefrom, and to take certain affirmative actions designed to effectuate the policies of the Act. My recommended Order will require Respondent to offer Edward Wagner, Lawrence Wiegman, Michael Stern, Ronald Blood, Patrick Cullinan, and Anthony Hynous reinstatement to their former jobs, terminating, if necessary, any replacements, and make whole each of the named employees for any loss of earnings they may have suffered by reason of the Respondent's discrimination against them: 18/ and that it post

18/ In accordance with the rule announced in Abilities and Goodwill, Inc., 241 NLRB No. 5, I find Respondent's liability for loss of earnings runs from the date of its discharge letter to each of the alleged discriminatees as follows:
Ronald Blood - October 4, 1978

appropriate notices. Loss of backpay shall be computed and interest thereon shall be added in the manner prescribed in F. W. Woolworth Company, 90 NLRB 289 and Florida Steel Corporation, 231 NLRB 651.19/

Upon the foregoing findings of fact and conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following: 20/

18/ (Continued) Patrick Cullinan - October 30, 1978
Anthony Hynous - October 30, 1978
Michael Stern - October 30, 1978
Edward Wagner - October 3, 1978
Lawrence Wiegman - October 3, 1978

19/ See generally, Isis Plumbing & Heating Co., 138 NLRB 716 (1962).

20/ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ORDER

Respondent, Lyon & Ryan Ford, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Interfering with, restraining and coercing its employees in the exercise of their rights guaranteed to them in Section 7 of the Act, in violation of Section 8(a)(1) of the Act, by interrogating its employees about their union activities.

(b) Terminating its employees and refusing to reinstate them because of their protected concerted activities or their union activities.

(c) Refusing to recognize or bargain collectively with Automobile Mechanics Local 701, International Association of Machinists and Aerospace Workers, AFL-CIO, as the exclusive collective bargaining representative of the employees in the

unit described below:

> All mechanics, bodymen, painters, apprentices and semi-skilled workers employed at Respondent's facility currently located at 104 - Route 173, Antioch, Illinois, but excluding partsmen, porters, service writers, undercoaters, new and used car get ready men, prep and detail men, janitors, utility laborers, office clerical employees, salesmen, professional employees, guards and supervisors as defined in the Act.

(d) In any other manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action which is deemed to be necessary to effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and

other terms and conditions of employment.

(b) Offer Edward Wagner, Lawrence Wiegman, Michael Stern, Ronald Blood, Patrick Cullinan and Anthony Hynous immediate and full reinstatement to their former jobs or if that job no longer exists, to a substantially equivalent position without prejudice to their seniority or other rights and privileges, discharging, if necessary, any replacements hired on or after September 12, 1978 strike.

(c) Make the above-named employees whole for any loss of pay they may have suffered as a result of the discrimination against them in the manner set forth in the section of this Decision entitled "The Remedy."

(d) Preserve, and upon request, make available to the Board or its agents, for examination and copying, all payroll

records, social security payment records, timecards, personnel records and reports and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Antioch, Illinois facility, copies of the attached notice makred "Appendix." 21/ Copies of said notice on forms provided by the Regional Director for Region 13, after being duly signed by its authorized representative, shall be posted by it immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places

21/ In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C. July 27, 1979.

/s/
J. Pargen Robertson
Administrative Law Judge

APPENDIX D

29 U.S.C. Section 158.

(a) It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to Section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any

term or condition of employment to encourage or discourage membership in any labor organization. . . . Provided,

* * * * *

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement,

or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification--

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

The duties imposed upon employers, employees, and labor organizations by paragraphs (2)-(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike

within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158 to 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty

days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

29 U.S.C. Section 159.

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees

in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rate of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

(b) The Board shall decide in each

case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it

includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board--

(A) by an employee or group of employees or any individual or labor

organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition

and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor

organization or its predecessor not issued in conformity with section 160(c) of this title.

(3) No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this subchapter in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling.

(d) Whenever an order of the Board made pursuant to section 160(c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such

investigation shall be included in the transcript of the entire record required to be filed under subsection (e) or (f) of section 160 of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

(e) (1) Upon the filing with the Board by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 158(a) (3) of this title, of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to

such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

29 U.S.C. Section 160

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of

any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such

person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the

issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence appliecable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

(c) The testimony taken by such member,

agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be,

responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of subsection (a) (1) or (a) (2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the

said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(d) Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief

or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to

questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as

a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the

circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and

proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing,

modifying, and enforcing as so modified, or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by sections 101 to 115 of this title.

(i) Petitions filed under this subchapter shall be heard expeditiously, and if possible within ten days after they have been docketed.

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person

resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have

adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 158(b) of this title, or section 158(e) of this title or section 158(b) (7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or

regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: Provided further, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable

injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: Provided further, That such officer or regional attorney shall not apply for any restraining order under section 158(b) (7) of this title if a charge against the employer under section 158(a) (2) of this title has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the court shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: Provided further, That for the purposes of

this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 158(b)(4)(D) of this title.

(m) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of subsection (a)(3) or (b)(2) of section 158 of this

title, such charge shall be given priority over all other cases except cases of like character in the office where it is filed or to which it is referred and cases given priority under subsection (1) of this section.

Office-Supreme Court, U.S.
FILED
SEP 18 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-128

In the Supreme Court of the United States

OCTOBER TERM, 1980

LYON & RYAN FORD, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

MICHAEL F. MESSITTE
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that petitioner voluntarily recognized the Union and therefore violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union and refusing to bargain with it.

2. Whether the Board properly ordered backpay for six unlawfully discharged strikers from the dates of their discharges.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statute involved 1

Statement 2

Argument 5

Conclusion 11

TABLE OF AUTHORITIES

Cases:

Abilities & Goodwill, Inc., 241 N.L.R.B. 27, enforcement denied on other grounds, 612 F. 2d 6 ..... 4, 5, 8, 9

Chevron Oil Co. v. *Huson*, 404 U.S. 97 ..... 5, 9

Jerr-Dan Corp., 237 N.L.R.B. 302, enforced, 601 F. 2d 575 6

Linden Lumber Division, Summer & Co. v. *NLRB*, 419 U.S. 301 6

NLRB v. *A. Lasaponara & Sons, Inc.*, 541 F. 2d 992, cert. denied, 430 U.S. 914 6

NLRB v. *Broadmoor Lumber Co.*, 578 F. 2d 238 6

NLRB v. *Brown & Connolly, Inc.*, 593 F. 2d 1373 6

NLRB v. *Gogin*, 575 F. 2d 596 6

NLRB v. *International Van Lines*, 409 U.S. 48 7

Page

Cases—(Continued):

NLRB v. *Rutter-Rex Mfg. Co.*, 396 U.S. 258 7

NLRB v. *Seven-Up Bottling Co.*, 344 U.S. 344 7

Phelps Dodge Corp. v. *NLRB*, 313 U.S. 177 7

Toltec Metals, Inc. v. *NLRB*, 490 F. 2d 1122 6

Universal Camera Corp. v. *NLRB*, 340 U.S. 474 7

Statute:

National Labor Relations Act, 29 U.S.C. 151 *et seq.* :

Section 8(a)(1), 29 U.S.C. 158(a)(1) 4
Section 8(a)(3), 29 U.S.C. 158(a)(3) 4
Section 8(a)(5), 29 U.S.C. 158(a)(5) 4

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 81-128

LYON & RYAN FORD, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 647 F. 2d 745. The decision and order of the National Labor Relations Board (Pet. Apps. B and C) are reported at 246 N.L.R.B. No. 2.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 1981. The petition for a writ of certiorari was filed on July 21, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set out in the petition (Pet. App. D).

STATEMENT

1. In August 1978, the Union[1] obtained authorization cards and applications for Union membership from a majority of the Company's employees. Thereafter, on August 24, 1978, Union business representatives Donald Carlson and Ed Vaughn presented these cards and applications to Company president Larry Ryan. At the same meeting, they gave Ryan a copy of a letter stating that a majority of the Company's "mechanics, semi-skilled and apprentices, bodymen and painters" had designated the Union as their bargaining agent. The letter also demanded that the Company recognize the Union as bargaining representative of those employees and begin negotiations with the Union for a collective bargaining agreement. During this meeting, the scope of the proposed bargaining unit was discussed and clarified; Ryan examined each of the Union authorization cards and membership applications; and Ryan inspected a copy of the recently expired master contract for the Chicago area and a list of changes that would be included in the new master contract. Carlson briefly explained several provisions of the master contract, reviewed the wage scale, and answered Ryan's specific questions concerning the cost of welfare and pension provisions and the extent of the Union's insurance coverage (Pet. App. C-3 to C-7 & n.2).

When Carlson, Vaughn and Ryan met again four days later, they were joined by Patrick Ryan—Larry Ryan's son and general manager of the Company. The parties again discussed the terms of the master contract. When it was noted that the Company's vacation policy was more generous than the one provided in the master contract, Carlson stated that he would "take the good with the bad" and go with the master contract. The parties then discussed the

---

[1]Automobile Mechanics Local 701, International Association of Machinists and Aerospace Workers, AFL-CIO.

job classifications of specific employees. When they were unable to settle on the classification of two of the Company's employees, Carlson requested another meeting. At the close of the meeting, Carlson was permitted to go into the shop and talk to some of the employees (Pet. App. C-8 to C-10).

Later that day and the following day, Patrick Ryan interrogated two employees about Union sympathies and asked if more money would make the difference (Pet. App. C-12 to C-13 & n.3).

On September 1, when Carlson and Vaughn arrived for a scheduled meeting, Larry Ryan stated that he wanted a "Federal election." Carlson responded that he was disappointed with that decision because he thought that everything had been going along fine with the exception of whether to include two employees in the unit. Carlson pointed out that Ryan had seen all the Union authorization cards and applications and had discussed the contract and classifications. He added that if a contract were not signed by September 12 there would be a work stoppage (Pet. App. C-10 to C-11).

No contract was signed, and on September 12, 11 employees began picketing the Company (Pet. App. C-11). During October, the Company sent the following letter to six of the striking employees (*id.* at C-12):

> This letter is to inform you that effective _____ we have hired an individual who will replace you on our work force. Accordingly it will not be our intention to recall you to work at the conclusion of our labor dispute, in as much as the new employee will be taking your place.

2. The Board agreed with the administrative law judge's conclusions that the Union had represented a majority of the employees in an appropriate unit when it requested

recognition on August 24, 1978; that the Union had satisfactorily demonstrated its majority status to Larry Ryan on August 24; that Ryan had recognized the Union as majority representative for the unit employees on August 24, had engaged in discussions and negotiations concerning terms of the proposed contract with the Union on that date and other occasions; and that, therefore, the Company had violated Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5), by withdrawing recognition from the Union and refusing to bargain with it on September 1, 1978. The Board further found that the strike that began on September 12, 1978, resulted directly from the Company's withdrawal of recognition and was, therefore, an unfair labor practice strike. Accordingly, the Board found that the Company had violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by discharging six employees because of their involvement in the unfair labor practice strike. Finally, the Board found that the Company had violated Section 8(a)(1) by interrogating two employees about their Union sympathies (Pet. App. B-2, C-24 to C-31).[2]

In accordance with its policy announced in *Abilities & Goodwill, Inc.*, 241 N.L.R.B. 27, enforcement denied on other grounds, 612 F. 2d 6 (1st Cir. 1979), the Board ordered the Company to reinstate the six unlawfully discharged strikers with backpay running from the dates of their discharges, rather than from the dates on which they had requested reinstatement (if any), as had been the Board's previous policy (Pet. App. B-2 to B-3, C-35 to C-36 & n.18).

3. The court of appeals upheld the decision of the Board and enforced its order (Pet. App. A-1 to A-22). The court

---

[2]This finding was neither contested in the court of appeals (Pet. App. A-7) nor challenged in the petition.

found the Board's conclusion that petitioner had voluntarily recognized the Union to be supported by substantial evidence (Pet. App. A-8 to A-14). The court also upheld the Board's policy whereby "an unlawfully discharged striker is no longer required to request reinstatement to trigger an employer's backpay obligation" (*id.* at A-18). It rejected the Company's assertion that the new policy was "onerous" (*id.* at A-19):

> As in the case of any discharged employee, the employer must make an offer of reinstatement. If the striking employee thereafter refuses to return to work, the employer's position is vindicated and his backpay obligation is tolled. When the employee willfully withholds his services, the employer is thus not responsible for his corresponding loss of earnings. Even where an employer fails to offer reinstatement, he is entitled to reduce his backpay liability by presenting evidence that the employee would have refused the reinstatement offer had it been made.

Finally, the court rejected the Company's contention that the *Abilities & Goodwill* remedy should not have been applied retroactively to it. Relying on the standard enunciated in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), the court concluded (Pet. App. A-21) that

> the new rule was not an unforeshadowed departure from the Board's previously existing practice, and the Board has sufficiently demonstrated a basis for its view that retroactive application will further rather than retard the operation of the rule. In addition, retroactive application will not create substantial injustice or undue hardship for either party.

ARGUMENT

1. An employer that has not committed unfair labor practices has the right to require an election regardless of a union's demonstrating majority status by other evidence,

such as by authorization cards. *Linden Lumber Division, Summer & Co.* v. *NLRB*, 419 U.S. 301, 310 (1974). The Board and the court of appeals agree, however, that once an employer commits itself to recognizing and bargaining with a union based on a showing of majority support by such other evidence, the employer may not renege on that commitment and insist upon an election. See, *e.g.*, *NLRB* v. *Brown & Connolly, Inc.*, 593 F. 2d 1373, 1374 (1st Cir. 1979); *NLRB* v. *Broadmoor Lumber Co.*, 578 F. 2d 238, 242 (9th Cir. 1978); *NLRB* v. *A. Lasaponara & Sons, Inc.*, 541 F. 2d 992, 995 (2d Cir. 1976), cert. denied, 430 U.S. 914 (1977); *Toltec Metals, Inc.* v. *NLRB*, 490 F. 2d 1122 (3d Cir. 1974); *Jerr-Dan Corp.*, 237 N.L.R.B. 302 (1978), enforced, 601 F. 2d 575 (3d Cir. 1979); cf. *NLRB* v. *Gogin*, 575 F. 2d 596, 605 (7th Cir. 1978).

Petitioner asserts (Pet. 24-30), however, that it did not voluntarily recognize the Union and that the Board, upheld by the court of appeals, improperly based its contrary finding on the fact that petitioner agreed to look at the authorization cards tendered by the Union. There is no merit to this contention. The finding that petitioner voluntarily agreed to recognize the Union was not based solely on Larry Ryan's perusal of the cards. As the court of appeals noted (Pet. App. A-9):

> At [the] initial meeting with Union representatives, Ryan also examined a copy of the proposed contract and discussed various contractual provisions. He voiced no objection to the Union as a properly designated bargaining representative, and negotiations continued at a second meeting several days later, in which the parties compared Union contractual provisions with current company policy and considered the job classification of employees within the proposed bargaining unit. After scheduling a third meeting to settle differences over the inclusion of two employees in the

> bargaining unit, Larry Ryan gave the Union representatives permission to speak to employees during working hours. This course of conduct is consistent with, and indicative of, the commitment necessary to create a bargaining relationship and warranted a finding by the Board that the Company had recognized the Union as the employees' bargaining agent.

Thus, contrary to petitioner's contention, this is not a case of an employer being entrapped into recognizing a union merely because of an equivocal reaction to a recognition demand based on authorization cards.

Accordingly, the first question presented is merely whether the court of appeals properly found that substantial evidence supported the Board's finding that petitioner's conduct constituted voluntary recognition of the Union. That issue, which turns on the facts of this particular case, does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 492-493 (1951). In any event, as shown above (pages 2-3), the record amply supports the Board's affirmative conclusion.

2. There is no merit to petitioner's additional contention (Pet. 31-39) that the Board improperly ordered the Company to reinstate six unlawfully discharged strikers with backpay computed from the dates of their discharges. The Board's order was well within its broad discretion to "devis[e] remedies to effectuate the policies of the Act." *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953); see *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 194 (1941); cf. *NLRB* v. *Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969). The Board's order also is consistent with the view of this Court expressed in *NLRB* v. *International Van Lines*, 409 U.S. 48, 53 (1972), that employees victimized by employer unfair labor practices are not to be deprived of an appropriate remedy because they are strikers. Moreover,

the decision of the court of appeals upholding the Board's order creates no conflict among the circuits. In these circumstances, further review by this Court is unwarranted.

a. In *Abilities & Goodwill, Inc.*, 241 N.L.R.B. 27, enforcement denied on other grounds, 612 F. 2d 6 (1st Cir. 1979), the Board determined to treat unlawfully discharged strikers in the same manner as any other discriminatorily discharged employee for the purpose of computing backpay. Accordingly, it held that an unlawfully discharged striker no longer would be required to request reinstatement in order to trigger an employer's backpay obligation. As the Board observed (241 N.L.R.B. at 27-28), a discriminatorily discharged employee never has been required to request reinstatement because such a request by an employee, having just been fired by his employer, would be futile. The Board found this rationale equally applicable to an employer's discharge of a striker, which—like the termination of any other employee—effectively notifies him that his services are no longer desired. In addition, because it is the employer who has acted unlawfully, the burden properly is placed on the wrongdoer to remedy its unfair labor practice by offering the victim immediate and full reinstatement. This rationale, too, is, as the Board explained in *Abilities & Goodwill, supra*, 241 N.L.R.B. at 27, equally applicable to unlawfully discharged strikers, since "there is nothing peculiar to a strike which justifies dissimilar treatment. The nature of the employer's unlawful conduct is not changed by the fact that the employee happens to be a striker at the time of discharge."

There is no merit to petitioner's contention (Pet. 32) that under the *Abilities & Goodwill* rule, "the employer will be forced to pay the employees for all the time that they are on strike * * * even if they would have continued to refuse to work if they had not been discharged." As the Board

pointed out (*Abilities & Goodwill, supra*, 241 N.L.R.B. at 27), the employer can easily resolve any ambiguity concerning whether the employees are on strike by advising them that it is rescinding those discharges and offering them reinstatement. At that point, any uncertainty is eliminated; if an employee refuses to report to work, "it becomes clear that the discriminatee wishes to resume the status of striker; and the employer's backpay obligation, if any, is tolled" (*ibid.*). Moreover, as the court of appeals noted (Pet. App. A-19), "[e]ven where an employer fails to offer reinstatement, he is entitled to reduce his backpay liability by presenting evidence that the employee would have refused the reinstatement offer had it been made."

b. Nor is there merit to petitioner's contention (Pet. 37-39) that the Board's retroactive application of the *Abilities & Goodwill* remedy to it raises an issue warranting review by this Court. Applying the test established by this Court in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-107 (1971), the court below found retroactivity appropriate here because the *Abilities & Goodwill* remedy "rectifies an apparent disparity in the treatment of discharged employees [and] was also not an unforeshadowed departure by the Board from its prior line of decisions" (Pet. App. A-20).

Petitioner asserts (Pet. 38-39) that the court of appeals erred in concluding that the new rule was "foreshadowed" within the meaning of *Chevron*, arguing (Pet. 39) that the change was an "abrupt change of policy" caused by "a change of membership on the Board." However, as the court of appeals correctly noted (Pet. App. A-19 to A-20; emphasis in original), the *Abilities & Goodwill* remedy

> is not so much an abrupt departure from Board precedent as it is the natural evolution of the Board's efforts over the years to achieve a "just result." Several years prior to *Abilities & Goodwill*, the Board created a

> futility exception to the reinstatement rule for discharged strikers. Under this exception, if evidence indicated that a request for reinstatement would be futile, the striker was entitled to reinstatement with backpay even if no request had been made. * * * It was neither unreasonable nor unforeseeable that the Board should elect to extend this exception by creating a presumption of apparent finality of discharge in strike situations. It would appear to be a rare case where a reinstatement request by a striking employee who had just been fired would *not* be futile. Since the backpay award for unlawfully discharged working employees is based on an identical presumption of futility, the reasons for distinguishing logically between the two situations tend to disappear.

Moreover, petitioner nowhere challenges the court of appeals' finding (Pet. App. A-21) that retroactive application creates no "substantial injustice or undue hardship." In these circumstances, retroactive application was clearly appropriate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

MICHAEL F. MESSITTE
Attorney
National Labor Relations Board

SEPTEMBER 1981

DOJ-1981-09